Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Federal Communications Commission, in a broadcast licensing proceeding concerning a public television station, must make an independent assessment of the station's compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, even though enforcement of that provision is committed to other federal agencies.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement:	
The statutory scheme	2
Proceedings before the Commission	5
The decision of the court of appeals	7
Reasons for granting the petition	9
Conclusion	23
Appendix A	1a
Appendix B	43a
Appendix C	45a
Appendix D	47a
Appendix E	63a
Appendix F	79a

TABLE OF AUTHORITIES

Cases:

Baker v. *Bell*, 630 F.2d 1046	19
Cannon v. *University of Chicago*, 441 U.S. 677	17, 20
Cherry v. *Mathews*, 419 F.Supp. 922	16
Davis v. *Southeastern Community College*, 574 F.2d 1158, rev'd on other grounds, 442 U.S. 397	19-20
FCC v. *National Citizens Committee for Broadcasting*, 436 U.S. 775	12
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134	10, 12
FCC v. *Sanders Brothers Radio Station*, 309 U.S. 470	15
FCC v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981)	10, 11
Kling v. *County of Los Angeles*, 633 F.2d 876	19
Leary v. *Crapsey*, 566 F.2d 863	20

Cases—Continued Page

Pennhurst State School v. *Halderman*, No. 79-1404 (Apr. 20, 1981) 20
NAACP v. *FPC*, 425 U.S. 662 ..... 12, 22
NAACP v. *Medical Center, Inc.*, 599 F.2d 1247 19
Pushkin v. *Regents of the University of Colorado*, No. 81-1224 (10th Cir. Sept. 4, 1981) 19
Simpson v. *Reynolds Metals Co.*, 629 F.2d 1226 19
Southeastern Community College v. *Davis*, 442 U.S. 397 ..... 20, 21
United Handicapped Federation v. *Andre*, 558 F.2d 413 20
University of Texas v. *Camenisch*, No. 80-317 (Apr. 29, 1981) 20

Statutes:

Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d *et seq.*:
Section 601, Title VI, 42 U.S.C. 2000d 15
Section 601, Title VI, 42 U.S.C. 2000d-1 16
Communications Act of 1934, Title III, 47 U.S.C. 301 *et seq.*:
47 U.S.C. 307(a) 2, 80a
47 U.S.C. 308(a) 2
47 U.S.C. 309(a) 2, 80a
47 U.S.C. 309(d) 2, 23, 81a
47 U.S.C. 309(d)(2) 11
47 U.S.C. 309(e) 11, 23, 82a
47 U.S.C. 313 15
Education Amendments of 1972, Title IX, 20 U.S.C. 1681 *et seq.*:
Section 901, 20 U.S.C. 1681 ..... 13, 16
Section 901(a), 20 U.S.C. 1681(a) 13, 15
Section 902, 20 U.S.C. 1682 16
Public Broadcasting Act of 1967, 47 U.S.C. (& Supp. III) 390 *et seq.*:
47 U.S.C. 390-394 4
47 U.S.C. 390-399 4
47 U.S.C. 396(b) 4
47 U.S.C. 398 4
47 U.S.C. 402(b) 10

Statutes—Continued Page

Rehabilitation Act of 1973, Section 504, 29 U.S.C. (& Supp. III) 794 ..... *passim*
Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2982-2983, 29 U.S.C. (Supp. III) 794a(a)(2) 17, 18
42 U.S.C. 6102 13
47 U.S.C. 402(b) 10

Miscellaneous:

15 C.F.R. 8.7(b) 5
15 C.F.R. 8.7(e) 5
15 C.F.R. 8.7-8.14 5
15 C.F.R. 8.8(a) 5
15 C.F.R. 8.10(a) 5
15 C.F.R. 8.10(b) 5
15 C.F.R. 8.11(a) 5
34 C.F.R. 100.6-100.10 4
34 C.F.R. 100.6(b) 5, 85a
34 C.F.R. 100.7(a) 5, 86a
34 C.F.R. 100.7(b) 5
34 C.F.R. 100.7(c) 5
34 C.F.R. 100.7(d) 5, 87a
34 C.F.R. 100.8(a) 5, 87a
34 C.F.R. 100.10(f) 19, 88a
34 C.F.R. Part 104 19
34 C.F.R. 104.61 ..... 4, 85a
45 C.F.R. 80.6-80.10 ..... 5, 19
45 C.F.R. 80.6(b) 5
45 C.F.R. 80.7(a) 5
45 C.F.R. 80.7(b) 5
45 C.F.R. 80.7(c) 5
45 C.F.R. 80.7(d) 5
45 C.F.R. 80.8(a) 5
45 C.F.R. 80.10(f) 19
45 C.F.R. 84.61 ..... 5, 18, 19, 90a
45 C.F.R. Part 85, amended and redesignated as 28 C.F.R. Part 41, 46 Fed. Reg. 40686-40687 (1981) 3, 83a
28 C.F.R. 41.1-41.7 3
28 C.F.R. 41.4 ..... 4, 83a

Miscellaneous—Continued Page

28 C.F.R. 41.4(a) 17
28 C.F.R. 41.5 ..... 3, 84a
28 C.F.R. 41.5(a) 3
28 C.F.R. 41.6 ..... 22, 84a
47 C.F.R. 73.1250(f) 11
120 Cong. Rec. (1974):
p. 30551 17
p. 35972 17
Exec. Order No. 11914, 45 C.F.R. Part 85 App. A, at 374 ..... 3, 17
Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980) .. 3, 22
FCC Form 303, 61 F.C.C. 2d 27 (1976) 6
43 Fed. Reg. 53765-53767 (1978) 5, 19
45 Fed. Reg. 4954 (1981) 19
46 Fed. Reg. (1981):
pp. 37068-37069 ..... 5, 19, 89a
pp. 40686-40687 3
H.R. Rep. No. 93-1457, 93d Cong., 2d Sess. (1974) .. 17, 20
S. Rep. No. 93-1139, 93d Cong., 2d Sess. (1974) 17, 20
S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974) 17, 20
S. Rep. No. 95-890, 95th Cong., 2d Sess. (1978) 18
Violation by Applicants of Laws of U.S., 42 F.C.C. 2d 399 (1951) 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-42a) is reported at 655 F.2d 297. The decisions of the Federal Communications Commission (Apps. D and E, *infra*, 47a-78a) are reported at 69 F.C.C. 2d 451 and 72 F.C.C. 2d 273.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981. A timely petition for rehearing was denied on July 8, 1981 (Apps. B and C, *infra*,

43a-46a). On September 29, 1981, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including October 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in App. F, *infra*, 79a-90a.

STATEMENT

The Statutory Scheme

Under the Communications Act of 1934, the Federal Communications Commission ("Commission") is given authority to grant and renew broadcast licenses when it finds that the public interest, convenience, and necessity will be served thereby. 47 U.S.C. 307(a), (d), 308(a), 309(a), (d). The Communications Act contains no provision defining the duties of broadcasters toward handicapped persons or requiring the Commission to prescribe those duties.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, provides in relevant part that "[n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *."[1]

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[1] In 1978, after the expiration of the 1974-1977 license term under review in this case, Section 504 was amended to prohibit discrimination against the handicapped, not only "under any program or activity receiving Federal financial assistance," but also "under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. (Supp. III) 794. In the proceed-

Enforcement of these provisions of Section 504 has been committed to the federal agencies providing financial assistance. 28 C.F.R. 41.1-41.7.[2] Each such agency must establish a system of enforcement to ensure that programs and activities receiving its funds comply with Section 504. 28 C.F.R. 41.5. That system must include "[t]he enforcement and hearing procedures that the agency has adopted for the enforcement of title VI of the Civil Rights Act of 1964." 28 C.F.R. 41.5(a). Each funding agency also is required to promulgate regulations implementing Section 504 with respect to those programs and activities

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ings below, respondents did not argue and the court did not hold or suggest that this amendment imposed any duties upon the Commission relevant to this case. Even if the Commission were deemed an "Executive agency" within the meaning of the amendment, programming of broadcasters licensed by the Commission is not a "program or activity conducted by" the Commission itself.

[2] Enforcement of Section 504 originally was committed to the funding agencies by Exec. Order No. 11914, 45 C.F.R. Part 85 App. A, at 374, which required each such agency to issue rules, regulations, and directives implementing the statute and empowered it to withhold assistance from programs or activities that failed to comply. That Executive Order also gave the Secretary of Health, Education, and Welfare ("HEW") responsibility for coordinating the implementation of Section 504 and required the Secretary to issue certain general guidelines. General guidelines later were issud by HEW. 45 C.F.R. Part 85, amended and redesignated as 28 C.F.R. Part 41 in 46 Fed. Reg. 40686-40687 (1981).

By Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980), responsibility for coordinating the implementation of Section 504 was transferred to the Attorney General, but the general guidelines previously issued by HEW were retained.

for which it furnishes financial assistance. 28 C.F.R. 41.4.

The two principal federal agencies that provide financial assistance to television stations are the Departments of Education and Commerce.[3] Both departments have established comprehensive procedures for enforcing Section 504.[4] Each recipient of funds

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[3] The Department of Education funds the production of educational television programs and furnishes them to noncommercial educational stations. 20 U.S.C. 3201(a)(2). The Department of Commerce administers grants for the construction of educational broadcasting facilities. 47 U.S.C. 390-394. Smaller subsidies are provided by other federal executive agencies, such as the National Endowments for the Arts and Humanities.

Noncommercial educational stations also receive substantial grants from the Corporation for Public Broadcasting, "a nonprofit corporation" that is "not * * * an agency or establishment of the United States Government." 47 U.S.C. 396(b). Although the Public Broadcasting Act of 1967, 47 U.S.C. 390-399, under which those grants are extended, expressly provides that nothing contained in the Act shall subject grantees to federal interference or control (47 U.S.C. 398), the court below held that such funds constitute "Federal financial assistance" within the meaning of Section 504 of the Rehabilitation Act and therefore subject grantees to that provision's requirements (App. A, *infra*, 21a n.48). Because KCET, like other noncommercial educational television stations, receives financial assistance from federal executive departments and agencies, as well as the Corporation for Public Broadcasting, this case does not present the question whether the receipt of grants from the latter entity would by itself suffice to make Section 504 applicable.

[4] Under 34 C.F.R. 104.61, the Department of Education's title VI procedures (34 C.F.R. 100.6-100.10) apply to Section 504 as well. The Department of Commerce has not yet adopted final regulations implementing Section 504. Until it does so, it is operating under the implementing regu-

must submit periodic compliance reports,[5] and the departments must periodically review the activities of all recipients.[6] If an aggrieved person believes that an applicant or recipient has violated Section 504, he or she may file a written complaint with the relevant department, and a prompt investigation will be conducted.[7] If a violation is found and compliance cannot be achieved by informal means, the department may suspend, terminate, or refuse to grant funds.[8] The department also may attempt to effect compliance by any other means permitted by law, including referral of the case to the Department of Justice with a recommendation that proceedings be brought under any applicable federal law.[9]

Proceedings Before the Commission

Respondents petitioned the Federal Communications Commission to deny the 1977 license renewal applications of one noncommercial and seven com-

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lations issued by HEW. 46 Fed. Reg. 37068-37069 (1981). (see 45 C.F.R. 84.61), HEW's Title VI procedures (45 C.F.R. 80.6-80.10) were made applicable to Section 504 proceedings. The Department of Commerce has issued proposed regulations implementing Section 504 (43 Fed. Reg. 53765-53767 (1978)), and under those regulations the Department's own Title VI procedures (15 C.F.R. 8.7-8.14) would apply. These three sets of title VI procedures do not differ significantly.

[5] 34 C.F.R. 100.6(b); 45 C.F.R. 80.6(b). See 15 C.F.R. 8.7(b).

[6] 34 C.F.R. 100.7(a); 45 C.F.R. 80.7(a). See 15 C.F.R. 8.7(e).

[7] 34 C.F.R. 100.7(b), (c); 45 C.F.R. 80.7(b), (c). See 15 C.F.R. 8.8(a), 8.10(a).

[8] 34 C.F.R. 100.7(d), 100.8(a); 45 C.F.R. 80.7(d), 80.8(a). See 15 C.F.R. 8.10(b), 8.11(a).

[9] 34 C.F.R. 100.8(a); 45 C.F.R. 80.8(a). See 15 C.F.R. 8.11(a).

mercial television stations in the Los Angeles area. The petitions charged, among other things, that the stations had violated Section 504 during the 1974-1977 license term under review by failing to offer programming understandable to the aurally handicapped.

The Commission denied the petitions (App. D, *infra*, 47a-62a). It held that the seven commercial stations were not subject to Section 504 because they did not receive federal financial assistance. By contrast, the Commission observed that the noncommercial station, KCET, "might fall within the purview" of the statute since it received federal funds (*id.* at 60a). Accordingly, the Commission stated that it would take into consideration any violations of Section 504 found by "the proper governmental agency to consider such matters," but it declined to make an independent assessment of KCET's compliance with Section 504 (*ibid.*).[10]

While rejecting respondents' arguments concerning Section 504, the Commission noted (App. D, *infra*, 51a-53a) that it had long sought technically and financially feasible methods of making television accessible to the handicapped as part of its responsibility under its own governing statutes. The Commission explained (*id.* at 53a) that broadcasters had been required to transmit emergency information visually and that experiments with "closed captioning" (*i.e.*, captions visible only on specially-equipped tele-

[10] It is the FCC's general policy to consider violations by a licensee of statutes administered by other government agencies only after an adjudication by the appropriate court, agency, or other government body has taken place. *FCC Form 303*, 61 F.C.C. 2d 27, 30 (1976); *Violation by Applicants of Laws of U.S.*, 42 F.C.C. 2d 399, 402-403 (1951). The purposes of this policy are comity, avoidance of administrative conflicts, and economy. 61 F.C.C. 2d at 30 n.4.

vision sets) had been encouraged and approved (*id.* at 52a). The Commission added, however, that at present there were "too many unanswered questions," both "technical and financial," to permit the imposition of additional requirements in this area (*id.* at 53a).

The Commission subsequently denied respondents' petition for reconsideration (App. E, *infra*, 63a-78a). It noted (*id.* at 71a) that a complaint alleging that KCET had failed to comply with Section 504 had been filed with the Department of Health, Education, and Welfare, and reiterated that it would take into consideration any violation of Section 504 found by the appropriate agency (*id.* at 71a). The Commission also observed (*id.* at 76a-77a) that an ongoing project of closed captioning voluntarily undertaken by broadcasters appeared promising but added that "if at a later date it is demonstrated that the project is not successful in making television programming more available and enjoyable to the hearing impaired, then it may be necessary for the Commission to determine if a rule-making is warranted to ensure that the hearing impaired are not deprived of the benefits of television" (*id.* at 77a).

The Decision Of The Court Of Appeals

A divided panel of the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's denial of the petitions concerning KCET (App. A, *infra*, 1a-42a). In an opinion by Judge Wright, the majority held that KCET was bound by Section 504 because it received substantial federal grants. Noting that the "FCC is directed to renew broadcast licenses only if it finds that renewal would serve the 'public interest, convenience, and

necessity' " (*id.* at 19a), the majority held that "the FCC's 'public interest' mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under section 504 * * *" (*id.* at 20a).

The majority summarily rejected (App. A, *infra*, 26a) the Commission's contention that it could not enforce Section 504 until the funding agencies articulated standards for broadcasters under that provision. While the majority acknowledged that "it is not the function of the FCC to adjudicate law violations, or, indeed to regard itself as bound strictly by the specific dictates of the Rehabilitation Act," the court concluded that the Commission is obligated "to effectuate the underlying national policy" expressed in Section 504 (*ibid.*). The court added (*id.* at 18a) that the Commission must endeavor to "define the station's responsibilities under the Rehabilitation Act and enforce the Act's policies in license renewal proceedings."

The majority similarly rejected the Commission's contention that it would be unfair to judge KCET's programming during the past license term by reference to Section 504's as yet undefined requirements in the field of broadcasting (App. A, *infra*, 27a). The majority believed (*ibid.*) that the license renewal proceedings should focus upon "the station's willingness—as measured against its capacity and its viewers' need—to provide programming for the aurally handicapped." Accordingly, the court remanded the case and directed the Commission "to inquire at least into the station's good faith as manifest in its efforts to provide service in accord with the legislative policy goals of Section 504" (*ibid.*).

The court reached a different result with respect to the seven commercial broadcasting stations. Rejecting the argument that broadcast licenses constitute "Federal financial assistance" within the meaning of Section 504, the court unanimously held (App. A, *infra*, 29a-35a, 40a) that the commercial stations lacked "specific obligations" under that provision. While deferring for the present to the Commission's determination of what was required from those stations under the "public interest" standard prescribed in the Communications Act, the majority warned (*id.* at 38a) that "judicial action might be appropriate at a later date."

Judge McGowan dissented from the court's decision concerning KCET. Noting that the Department of Education had issued a notice of intent to develop regulations applying Section 504 to the field of television programming and that the Commission stood "ready to take [those regulations] fully into account in subsequent license renewal proceedings," he concluded (App. A, *infra*, 40a-42a) that public television stations should not be required to undergo "the expense and uncertainty of renewal hearings" in the interim.

Petitions for rehearing and suggestions for rehearing en banc filed by KCET and the Commission were denied. Judge McGowan voted for rehearing, while Judges McKinnon and Robb voted for rehearing en banc (Apps. B and C, *infra*, 43a-46a).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the authority and responsibility of the Federal Communications Commission in passing on applications for renewal of station licenses of public broadcasters.

The decision of the court of appeals compels the Commission to incorporate into its "public interest" standard the "underlying national policy" expressed in legislation the enforcement of which is committed to other federal agencies. This precedent, if applied to only a small fraction of the myriad federal laws embodying important national policies, would quickly transform the public interest standard from " 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy' " (*FCC* v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981), slip op. 11, quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)), into an unwieldy prescription mandating far-reaching and burdensome inquiries in disregard of the responsibilities of other administrative bodies.

The decision below also imposes upon the Commission the difficult task of determining what is required of broadcasters by the "underlying national policy" expressed in Section 504. The Commission must shoulder that burden without guidance from the funding agencies charged with enforcement of Section 504, since those agencies have not yet articulated detailed standards applicable to television programming. And because the Commission must begin to enforce Section 504 at once, it will have to define that provision's requirements on a case-by-case basis during licensing proceedings. If the funding agencies do not follow the Commission's interpretation, then broadcasters will be faced with conflicting administrative commands.

Since the court below has exclusive appellate jurisdiction in broadcast licensing matters (47 U.S.C. 402(b)), its decision will affect most, if not all, of the approximately 270 noncommercial educational

television stations, all of which must apply for license renewal during the next three years. Under the court of appeals' decision, the Commission must make an individualized determination in each case and may find it necessary to conduct a "full hearing." 47 U.S.C. 309(d)(2), (e). The result will be a substantial administrative burden for the Commission and unnecessary expense for public stations already subject to serious financial constraints.

The FCC, under its own public interest mandate, has long sought technically and financially feasible methods of making television accessible to the handicapped.[11] The Commission's balanced resolution of the difficult problems in this area was entirely reasonable, and the decision of the court below, which supplants the Commission's expert discretion, therefore warrants this Court's review.

1. Just last term in *FCC* v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981), this Court reiterated that the public-interest standard is " 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry

[11] The Commission requires all broadcasters to present emergency information through subtitled programming understandable to the aurally handicapped. 47 C.F.R. 73.1250(f). Since 1970, it has urged all stations to arrange news broadcasts to permit lipreading whenever possible and to maximize the visualization of materials in news, weather, and sports programs (App. D, *infra*, 52a). It also has encouraged experiments with closed captioning techniques to better serve the aurally handicapped (*id.* at 52a-53a). In view of the technical and economic complexity of the issues involved, it has not required further action at the present time, but it has advised of its intent to consider rulemaking in the future under the public interest standard if available information suggests that such a step is appropriate (App. E, *infra*, 77a).

out its legislative policy.'" Slip op. 11, quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The Court added that the Commission must be given "broad discretion" in determining how best to achieve the goal of securing the maximum benefits of broadcasting for all the people (*ibid.*) and that the Commission is permitted "to implement its view of the public-interest standard * * * 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.'" *Id.* at 12, quoting *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978).

The decision below clashes with these principles. Instead of recognizing the Commission's "broad discretion" to determine how television can best serve the hearing impaired without inconveniencing other viewers unduly or imposing excessive financial burdens on broadcasters, the court below reversed the Commission's decision without identifying a single substantive mistake made by the Commission during the decade in which it has grappled with the problems in this difficult field. And instead of allowing the Commission to implement its own view of what the public interest, convenience, and necessity require, the court of appeals engrafted upon the Communications Act of 1934 the requirements of an unrelated statute the enforcement of which is committed to other federal agencies.

2. "This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). The public interest standard contained in the Communications Act of 1934 was intended as "a supple instrument"

for use by the expert body responsible for regulating the rapidly-changing field of broadcasting. That standard would quickly lose its utility, however, if the Commission were forced to superimpose upon it unrelated statutory requirements intended to be enforced by other agencies. The decision below threatens to impose on the public interest standard just such an unwarranted and impractical constraint.

Without citing any evidence that Congress intended such a result, the court of appeals held that the "underlying national policy" expressed in Section 504 of the Rehabilitation Act must be incorporated into the public-interest standard. If the court's decision were correct, then numerous other laws embodying important national policies would also have to be considered for inclusion within that standard. For example, 42 U.S.C. 6102, in language almost identical to that in Section 504, provides, with some exceptions, that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." Similarly, 20 U.S.C. 1681(a) provides, with a few exceptions, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." If Section 504 of the Rehabilitation Act must be incorporated into the public interest standard, then it could certainly be argued that 42 U.S.C. 6102 and 20 U.S.C. 1681 must be included as well. It could be maintained that the Commission is required to determine whether licensees have complied with those provisions by scheduling adequate programming addressing the needs and discussing the problems of the elderly and of mem-

bers of both sexes. No doubt similar arguments could be mounted on behalf of other, less closely related legislation. In this manner, the public interest standard could easily become burdened with extraneous statutory requirements, all designed to serve important national policies.[12]

As precedent for its holding, the majority notes that the Commission itself has adopted regulations dealing with the employment practices of licensees, even though the Equal Employment Opportunity Commission has primary responsibility for enforcement of the provisions of the Civil Rights Act of 1964 prohibiting discrimination in employment (App. A, *infra*, 23a). There is, however, a critical difference between the Commission's voluntary decision to assume such responsibilities and imposition of them by a court. The Commission's "broad discretion" is not abridged if it elects to take on such duties or to look for guidance in other statutes. The Commission would not knowingly take action that would interfere with its regulatory mission, and if it later learned that it had done so by inadvertence, its decision could be reversed unilaterally in most instances. By contrast, the court of appeals, lacking the Commission's expertise in the field of broadcasting and its familiarity with its own regulatory responsibilities, is much more likely to require the agency to assume re-

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[12] This problem is not remedied by the court's observation (App. A, *infra*, 26a) that the Commission need not "adjudicate law violations" or "regard itself as bound *strictly* by the *specific* dictates of the Rehabilitation Act" (emphasis added). The majority's language shows that the Commission must regard itself as bound to some unspecified degree by the requirements of the Act. Indeed, the court has required the Commission (*id.* at 18a) both to "define" the requirements of Section 504 and to "enforce the Act's policies in license renewal proceedings."

sponsibilities inconsistent with its broader duties. In addition, the court's actions, once taken, cannot easily be undone if the consequences prove undesirable.

The majority also notes that the Commission considers antitrust factors in performing its regulatory function. However, the Communications Act itself directs the Commission's attention to antitrust issues (see, *e.g.*, 47 U.S.C. 313). Indeed, Congress affirmatively intended that the Communications Act would preserve a "field * * * of free competition." *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940). Nondiscrimination against the handicapped, although an important national objective, does not bear the same close relationship to the Commission's regulatory goals.

3. The court below required the Commission to enforce Section 504 of the Rehabilitation Act without even inquiring whether Congress intended such a result. It is quite clear, however, that Congress intended Section 504 to be enforced, not by the Commission, but by federal agencies providing financial assistance to public broadcasters.

Section 504 was modeled after two earlier enactments prohibiting other forms of discrimination. The first of these, Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, forbids discrimination "on the ground of race, color, or national origin" under "any program or activity receiving Federal financial assistance." The second, Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), prohibits discrimination "on the basis of sex" under "any education program or activity receiving Federal financial assistance." Except for the type of discrimination prohibited, both provisions employ language virtually identical to that contained in Section 504.

The enforcement mechanism for the two earlier statutes is prescribed in express terms. 42 U.S.C. 2000d-1 requires that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity * * *" must "effectuate the provisions of section 2000d * * * with respect to such program or activity by issuing rules, regulations, or orders of general applicability * * *." 42 U.S.C. 2000d-1 also provides for refusal to grant, suspension, or termination of financial assistance to any program or activity that fails to comply with the implementing regulations. 20 U.S.C. 1682 provides for the enforcement of 20 U.S.C. 1681 in almost identical terms.

Although the Rehabilitation Act lacks a provision analogous to 42 U.S.C. 2000d-1 or 20 U.S.C. 1682, a similar method of enforcement was clearly contemplated.[13] The Senate Report concerning the 1974 amendments to the Act stated:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). * * * It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.
>
> *The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts * * *. This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrim-*

[13] See *Cherry* v. *Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976).

> *ination provisions*, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974) (emphasis added). Substantially identical language appears in the House report (H.R. Rep. No. 93-1457, 93d Cong., 2d Sess. 27 (1974)) and an earlier Senate report (S. Rep. No. 93-1139, 93d Cong., 2d Sess. 24 (1974)).[14] See generally *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-698 (1979) (because Title IX of the Education Amendments of 1972 was patterned upon Title VI of the Civil Rights Act of 1964 it should be presumed that a similar method of enforcement was intended).

In accordance with Congress' intent, a similar scheme of enforcement was implemented for Section 504. By Executive Order in 1976, "each Federal department and agency empowered to provide Federal financial assistance" was required to issue implementing regulations. Exec. Order No. 11914, 45 C.F.R. Part 85 App. A, at 374. Similarly, under subsequently-issued regulations designed to coordinate the enforcement of Section 504, each such department or agency was directed to "issue * * * a regulation to implement section 504 with respect to the programs and activities to which it provides assistance." 28 C.F.R. 41.4(a).

This scheme of enforcement was approved by Congress in enacting the 1978 amendments to the Rehabilitation Act, Pub. L. No. 95-602, 92 Stat. 2982.

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[14] See also 120 Cong. Rec. 30551 (1974) (remarks of Sen. Stafford); 120 Cong. Rec. 35972 (1974) (remarks of Rep. Vanik).

As part of those amendments, Congress passed 29 U.S.C. (Supp. III) 794a(a)(2), which provides that persons aggrieved by violations of Section 504 shall have the benefit of the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.]." Chief among those remedies is the withholding of financial assistance based upon a determination by the funding agency that its regulations have been violated. Thus, 29 U.S.C. (Supp. III) 794a(a)(2) was clearly predicated upon the assumption that each funding agency would issue regulations under Section 504 and adjudicate claimed violations of that provision, just as they did under the prior laws that served as models for Section 504[15]

In sum, by requiring the Commission to enforce Section 504, the court below substituted its own views on how Section 504 should be enforced for the scheme of enforcement intended by Congress and implemented by the Executive.

4. The court of appeals' decision might be justified if Section 504 would otherwise go unenforced, but that is hardly the case. The Departments of Education and Commerce, the two chief providers of federal financial assistance to broadcasters, have adopted procedures for receiving and adjudicating

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[15] The Senate Report stated unequivocally that 29 U.S.C. (Supp. III) 794a(a)(2) "codifie[d] existing practice as a specific statutory requirement." S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). At that time, funding agencies already had been required—either by executive order, regulation, or both—to issue interpretive guidelines and establish procedures for receiving, investigating, and adjudicating complaints. In addition, the Department of Health, Education, and Welfare had adopted its Title VI procedures for use under Section 504. 45 C.F.R. 84.61.

complaints of noncompliance with Section 504.[16] Indeed, just such a complaint concerning KCET's programming has been lodged with the Department of Education and is currently awaiting final decision. Programs or activities found to have violated Section 504 face serious sanctions, including the withholding of federal funds. 34 C.F.R. 100.10(f); 45 C.F.R. 80.10(f), 84.61; 46 Fed. Reg. 37068-37069 (1981). Moreover, a private cause of action under Section 504 has been recognized by all eight circuits that have addressed the question,[17] and respondents

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[16] The Department of Education has issued regulations (34 C.F.R. Part 104) specifying the requirements under Section 504 for programs and activities to which it provides assistance, but those regulations do not address the problems of television programming. As noted above, the Department of Education has issued a notice of intent to consider the advisability of adopting regulations in that field. 46 Fed. Reg. 4954 (1981).

As described on page 4 note 4, *supra*, the Department of Commerce has not yet issued final implementing regulations of general application and is presently operating (see 46 Fed. Reg. 37068-37069 (1981)) under the implementing regulations issued by the Department of Health, Education, and Welfare (45 C.F.R. 80.6-80.10, 84.61). The Department of Commerce has issued proposed regulations specifying the requirements of Section 504 for programs and activities that it funds (43 Fed. Reg. 53765-53767 (1978)), but those regulations do not address the problems of television programming.

[17] *Pushkin* v. *Regents of the University of Colorado*, No. 81-1224 (10th Cir. Sept. 4, 1981); *Kling* v. *County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980); *Baker* v. *Bell*, 630 F.2d 1046, 1055 (5th Cir. 1980); *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226, 1229-1230 (7th Cir. 1980) (private right of action at least until relevant implementing regulations issued); *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247, 1258-1259 (3d Cir. 1979); *Davis* v. *Southeastern*

themselves have brought suit under Section 504 against KCET and various federal departments and agencies.[18] In view of these direct methods of ensuring compliance with Section 504, enforcement by the Commission under the guise of applying the "public interest" standard in license renewal proceedings is neither necessary nor appropriate.

Nor was the decision below needed to alert the Commission to its responsibilities to the hearing-impaired segment of the television audience. Even before passage of the Rehabilitation Act, the Commission endeavored to find practicable means of making television accessible to the aurally handicapped. Although the Commission has not yet issued regulations requiring the captioning of entertainment pro-

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Community College, 574 F.2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); *Leary* v. *Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413, 415 (8th Cir. 1977).

This Court has not decided the question. See *Pennhurst State School* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), slip op. 27 (remanding for consideration of Section 504 issues); *University of Texas* v. *Camenisch*, No. 80-317 (Apr. 29, 1981) (issuance of preliminary injunction in private action under Section 504 moot); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 404 n.5 (1979) (issue not decided). But see *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-698 (1979) (private right of action under Title IX of Education Amendments of 1972 presumed because patterned after Title VI of Civil Rights Act of 1964). See also S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974); S. Rep. No. 93-1139, 93d Cong., 2d Sess. 25 (1974); H.R. Rep. No. 93-1457, 93d Cong., 2d Sess. 27 (1974).

[18] *Greater Los Angeles Council on Deafness (GLAD)* v. *Community Television of Southern California (KCET)*, No. CV 78-4715-R (C.D. Cal.). The complaint was recently dismissed as to the non-federal defendants.

grams,[19] it has pledged to consider that option in the future should voluntary experimental projects prove unsuccessful.

5. The decision below will have a significant detrimental impact upon the Commission and the nation's approximately 270 noncommercial educational television stations. During 1982 alone, about 90 such stations will be required to apply for renewal of their licenses. Following the decision of the court of appeals, petitions by aurally handicapped persons may be expected in many such cases. And in every case in which an objection to renewal is lodged, the Commission will have to determine whether the station has complied with the "underlying national policy" expressed in Section 504. As this Court recognized in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 412 (1979), "the line between a lawful refusal to extend affirmative action and illegal discrimination [is not] always * * * clear." Yet the Commission will be required to determine what Section 504 requires without the benefit of an interpretation from the funding agencies charged with the responsibility for enforcing that statute. Moreover, since the decision below unequivocally requires the Commission to begin enforcing Section 504 at once, the Commission will be required to define that provision's requirements on a case-by-case basis during licensing proceedings.

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[19] One of the unanswered questions militating against rulemaking at the present time is whether the hearing impaired would be better served by the current method of "closed captioning," with which ABC, NBC, and PBS are presently experimenting, or by "teletext," a method that is advocated by CBS and that would provide for both closed captioning and many other services.

By insisting that the Commission interpret Section 504's requirements in licensing proceedings and without awaiting the articulation of standards by the funding agencies, the decision of the court of appeals creates a serious potential for conflicting administrative requirements. The Commission's interpretation of Section 504's requirements in the field of television programming will almost certainly precede those of the funding agencies. If the funding agencies do not follow the Commission's lead, then broadcasters may be faced with inconsistent administrative commands.[20] If, on the other hand, the funding agencies feel compelled to abide by the Commission's interpretation, then the primary responsibility for interpreting Section 504 will be shifted from those agencies, contrary to Congress' intent. "To the extent that the *judiciary* orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly." *NAACP* v. *FPC*, 425 U.S. 662, 674 (1976) (Burger, C.J., concurring) (emphasis in original).

The decision below threatens to impose upon the Commission and noncommercial television stations the burden of protracted and costly hearings. Noncommercial television stations vary greatly in size, financial strength, audience, and independent production capabilities. Their ability to provide special serv-

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[20] By contrast, procedures have been established to prevent conflicts among the funding agencies. The Attorney General is responsible for coordinating the agencies' rulemaking efforts (Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980)), and 28 C.F.R. 41.6 provides for interagency cooperation in enforcing Section 504 and regulations issued thereunder.

ices for the hearing impaired therefore varies widely as well. In apparent recognition of these differences, the decision below indicates that Section 504's requirements will vary from station to station (App. A, *infra*, 27a). The Commission is directed to assess each station's "willingness—as measured against *its capacity and its viewers' need*—to provide programming for the aurally handicapped" (*ibid.*) (emphasis added). If a petition to deny license renewal based on noncompliance with Section 504 is filed, the station's "capacity" to provide service to the hearing impaired and "its viewers' need" may constitute "substantial and material questions of fact" (47 U.S.C. 309(d)) so that a "full hearing" will have to be held (47 U.S.C. 309(e)). Such hearings would impose a substantial and unnecessary financial burden upon already hard-pressed noncommercial stations, as well as the Commission.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1722

SUE GOTTFRIED, Individually and on Behalf of the Deaf and Hearing Impaired Population Within the Stations' Viewing Area, and GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

NATIONAL BROADCASTING COMPANY, INC., COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, METROMEDIA, INC., AMERICAN BROADCASTING COMPANIES, INC., KCOP TELEVISION, INC., RKO GENERAL, INC., GOLDEN WEST BROADCASTERS, and CBS, INC., INTERVENORS

Appeal from Orders of the
Federal Communications Commission

Argued November 5, 1980

Decided April 17, 1981

Before MCGOWAN, *Chief Judge*, WRIGHT, *Circuit Judge*, and GASCH,* *District Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

Opinion concurring in part and dissenting in part filed by *Chief Judge* McGowan.

Wright, *Circuit Judge*: This case, involving denial by the Federal Communications Commission (FCC or Commission) of a petition to deny license renewals to eight Los Angeles television stations,[1] presents difficult questions concerning the obligations of public and commercial broadcasters to attempt to meet the programming needs of persons with impaired hearing. The issues arise under two statutes: the Communications Act,[2] under which the Commission can renew a station's license only upon a finding that its programming has served the public interest, and Section 504 of the Rehabilitation Act of 1973,[3] which prohibits discrimination against "otherwise qualified" handicapped persons by recipients of federal financial assistance. Because public television stations are apparently bound by Section 504 of the Rehabilitation Act to provide service to "otherwise qualified" handicapped persons, we do not believe that the FCC could find the service of such stations

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[1] There are seven commercial stations and licensees involved: KABC-TV, American Broadcasting Companies, Inc.; KCOP-TV, KCOP Television, Inc.; KHO-TV, RKO General, Inc.; KNBC-TV, National Broadcasting Co., Inc.; KNXT-TV, CBS, Inc.; KTLA-TV, Golden West Broadcasters; and KTTY-TV, Metromedia, Inc. The eighth station is a noncommercial or public station, KCET-TV, licensed to Community Television of Southern California.

[2] The Communications Act of 1934, ch. 652, 48 Stat. 1064, *as amended*, 47 U.S.C. § 151 *et seq.* (1976) (hereinafter cited to U.S. Code only).

[3] Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357, *as amended*, 29 U.S.C. § 794 (1976) (hereinafter cited to U.S. Code only). The provision is quoted in text at note 37 *infra*.

to be adequate to justify renewal without at least inquiring specifically into their efforts to meet the programming needs of the hearing impaired. Accordingly, we hold that the challenge to the license renewal of public station KCET-TV must be remanded to the Commission for further proceedings.

We conclude, however, that Section 504 does not apply directly to commercial broadcasters. We therefore hold that the decision of the Commission concerning the seven commercial stations may be upheld, on the basis of both the record compiled below and the Commission's representations of substantial progress in extending the benefits of commercial television to the hearing impaired. In so doing, however, we recognize that the Commission's statutory obligation to pursue the public interest requires it to protect the interests of the hard of hearing in having meaningful access to commercial broadcasting. We also note that rulemaking might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing. Radio has been available to the general public for over half a century, as has television for over a quarter century. But millions of Americans have lived and died during that time without being able to enjoy radio and television simply because their hearing was impaired. It is time for the Commission to act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now.

I. BACKGROUND

A. *Statutory Context*

This case, in which appellants challenge an FCC order denying a petition to deny license renewals to

eight Los Angeles television stations,[4] arises against a complex background of federal statutes and administrative action. The Communications Act of 1934 charges the Federal Communications Commission with granting broadcast licenses and license renewals.[5] The Commission does so pursuant to a general mandate to protect and advance "the public interest, convenience, and necessity."[6] Although this mandate is general, the Commission has in fact interpreted it through the issuance of a number of regulations and guidelines. These Commission guidelines typically govern decisions about whether to renew broadcast licenses in cases where there is no announced competitor for a license held by the applicant for renewal.[7] Although the statute provides that "[a]ny party in interest may file with the Commission a petition to deny any application,"[8] the Com-

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[4] *See License Renewal Applications of Certain Television Stations Licensed For and Serving Los Angeles, California*, 69 FCC2d 451 (1978) (*Order*) (*reprinted at* Joint Appendix (JA) 1), *reconsid. denied*, 72 FCC2d 273 (1979) (*Reconsideration*) (JA 11).

[5] *See* 47 U.S.C. §§ 307-309 (1976).

[6] *See* 47 U.S.C. §§ 307(d), 309(a), 309(d) (1976).

[7] It is well settled that the Commission, in order to obviate the need for repetitive hearings, may specify by rule the criteria that will govern its decisions. *See United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202-205 (1956); *American Tel. & Tel. Co.* v. *FCC*, 539 F.2d 767, 774-775 (D.C. Cir. 1976). The Commission is not, of course, permitted to proceed pursuant to rules that are inconsistent with the underlying intent and purpose of the Communications Act. *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1212-1214 (D.C. Cir. 1971).

[8] 47 U.S.C. § 309(d) (1976).

mission need generally hold no hearings unless the petition raises a "substantial and material question of fact" [9] concerning the incumbent licensee's satisfaction of pertinent Commission standards. Where no question is raised concerning the station's compliance with Commission guidelines, renewal is generally granted without public hearing.

Both the courts and the FCC have construed the "public interest" standard for license awards to include a requirement that broadcasters endeavor to discover and to meet the programming needs of all significant groups within their areas of service.[10] The Commission publishes a list of specific groups whose needs must be "ascertained." [11] At least since

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[9] *See* 47 U.S.C. §§ 309(d)(2), 309(e) (1976). Where the Commission specifies by rule the criteria that will govern its licensing decisions, *see* note 7 *supra*, questions falling outside the ambit of those rules will ordinarily not be regarded as substantial or material, unless the party opposed to the Commission's adopted policies asserts reasons sufficient to justify a change or waiver of the rules. *United States* v. *Storer Broadcasting Co.*, *supra* note 7, 351 U.S. at 205; *American Tel. & Tel. Co.* v. *FCC*, *supra* note 7, 539 F.2d at 774.

[10] *See, e.g., Stone* v. *FCC*, 466 F.2d 316, 327-328 (D.C. Cir. 1972); *Amendment of the Primer on Ascertainment of Community Problems by Commercial Broadcast Applicants, Permittees and Licensees*, Docket No. 78-237 (April 4, 1980); *Ascertainment of Community Problems by Broadcast Applicants*, 53 FCC2d 3 (1975).

[11] *See Renewal Primer*, 57 FCC2d 418, Appendix D, 447 (1976). The 19 "ascertainment" categories mandate inquiries into the service needs of (1) agriculture, (2) business, (3) charities, (4) civic, neighborhood, and fraternal organizations, (5) consumer service organizations, (6) culture, (7) education, (8) the environment, (9) government, (10) labor, (11) the military, (12) minority and ethnic groups, (13) organizations of and for the elderly, (14) organizations of and for

1970 it has urged licensees to make efforts to serve the hearing impaired,[12] a group estimated to include at least 13 million people, nationwide.[13] But the Commission has declined to include the hearing impaired among the groups whose needs must specifically be consulted.[14] Nor has it ever promulgated guidelines requiring entertainment programming for the hard of hearing. The Commission has, however, insisted that emergency broadcasts must be made accessible to the deaf,[15] and, whenever individual broadcasters have sought Commission approval for innovative service to the hearing impaired, the Commission has given its approval.[16] For example, the

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women, (15) organizations of and for youth and students, (16) professions, (17) public safety, health, and welfare, (18) recreation, and (19) religion.

[12] *See The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC2d 917 (1970).

[13] *See Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, Docket No. 20693, 63 FCC2d 378, 379 (1976).

[14] The proposal that the handicapped should constitute a separate "ascertainment" category was specifically rejected in *Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey*, Docket No. 78-237, FCC 80-134 (released April 4, 1980).

[15] *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, Docket No. 20659, 61 FCC2d 18 (1976), *reconsid. denied*, 62 FCC2d 565 (1977).

[16] The most notable efforts in this area involve "closed captioning"—a method of subtitling, similar to that used in foreign language films, but different in that it can only be

Commission in 1976 adopted rules to permit "closed captioning" for visual display of aural material accompanying television programs.[17] Pursuant to this grant of permission, the Public Broadcasting Service (PBS) and two of the commercial networks began in March 1980 to provide a total of up to 20 hours a week of programming captioned by the National Captioning Institute.[18] The FCC has also emphasized

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seen on television sets equipped with decoding units. In 1972 the Commission authorized the Public Broadcasting System to initiate experiments with closed captioning, and in 1976 it promulgated rules to permit closed captioning by any broadcaster. *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, supra* note 13. The Commission has also instituted a clearinghouse program to provide information that would assist licensees in employing persons with various handicaps. The clearinghouse furnishes research data and reports concerning equipment availability and modification, and about various means to increase employment of and service to the handicapped. *See Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395,* Docket No. 21474, FCC 80-62 (released March 6, 1980).

[17] *See* note 16 *supra.*

[18] Brief for appellee at 5. The two commercial networks that are participating are the American Broadcasting Co. (ABC) and the National Broadcasting Co. (NBC). According to the National Captioning Institute, the Fall 1980 schedule of closed captioned programs included the ABC series Love Boat, Barney Miller, Eight is Enough, Friday Night Movie, and Three's Company, and the NBC series Disney's Wonderful World, Little House on the Prairie, Diff'rent Strokes, and Sunday Big Event. More than 15 PBS series are also captioned. *See National Captioning Institute, Schedule of Closed-Captioned Programs Fall 1980* (1980). The third major commercial network, the Columbia Broadcast-

in its public pronouncements that "licensees can and will be responsive to the needs of their [hearing impaired] viewers, but it is still the responsibility of each licensee to determine how it can most effectively meet those needs." [19]

Although it has recognized that Section 504 of the Rehabilitation Act of 1973 may impose a statutory obligation on public television stations to accommodate at least some of their programming to the needs of the hearing impaired,[20] the FCC has thus far declined to take specific steps to enforce the Act.[21] The Department of Education has been officially designated as the agency to develop guidelines clarifying the specific obligations imposed on public broadcast-

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ing System (CBS), is also involved in experimental efforts to provide the advantages of programming to the hard of hearing through a system known as "teletext." On July 29, 1980 CBS petitioned the FCC seeking a rulemaking leading to promulgation of rules that would allow television stations to undertake teletext transmission. *See Amendment of Part 73, Subpart E of the Rules Governing Television Broadcast Stations to Authorize Teletext*, RM-3727. "Teletext" is a generic name for systems that transmit letters, numbers, and other characters that can be made to appear on television screens equipped with special decoders. Because teletext could be used to provide information to the general public, CBS believes that it would ultimately be more useful to the hearing impaired, and also less expensive, than would a closed captioning system.

[19] *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, supra* note 13, 63 FCC2d at 389.

[20] *See Order, supra* note 4, 69 FCC2d at 459, JA 9.

[21] *See id.* at 458-459, JA 8-9; *Reconsideration, supra* note 4, 72 FCC2d at 276-280, JA 14-18.

ers by Section 504.[22] The FCC has indicated that if an broadcaster should be found by another agency of government to be in violation of Section 504, it would "consider the effect of that violation upon the licen-

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[22] The responsibility was originally assigned to the Department of Health, Education and Welfare (HEW). *See* Executive Order 11914, 41 FED. REG. 17871 (April 28, 1976). Acting on the advice of HEW's Office of Civil Rights (OCR), Secretary Harris concluded in October 1979 that § 504 was applicable to public broadcasters receiving federal financial assistance, and she instructed OCR to develop compliance standards for public stations. No standards had yet been promulgated, however, when the Department of Education was established on May 4, 1980. Under the Department of Education Organization Act, Pub. L. No. 96-88, 93 STAT. 691 (1979), the Department of Education assumed responsibility for administration of programs that provide financial assistance for production of programs shown on public television. The HEW study group that was involved in preparation of § 504 compliance guidelines for public television was also transferred to the Department of Education, and it remains there, located in the office of the Assistant Secretary for Civil Rights.

On January 19, 1981 the Department of Education issued a *Notice of Intent to Develop Regulations* concerning the rights of persons with impaired hearing to access to television programs. 46 FED. REG. 4954 (Jan. 19, 1981). It remains uncertain, however, when the rulemaking process will be completed. In *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California, d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.), the District Court ordered the Department to issue final regulations not later than February 17, 1981. But the District Court's order has been stayed by the Ninth Circuit, pending appeal. *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California, d/b/a KCET-TV*, Nos. 80-5400 and 80-5445 (9th Cir. Dec. 19, 1980) (order staying order of lower court and ordering expedition of appeal).

see's qualifications." [23] But because it is not the agency responsible for enforcement of the Rehabilitation Act, the FCC has stated that it will not attempt to hold broadcasters to any obligations thereunder, at least until the responsible agency has spoken.[24]

B. *Factual Background*

Sue Gottfried is a hearing impaired member of the Los Angeles community. On October 28, 1977, on behalf of herself and others similarly situated, Mrs. Gottfried filed petitions to deny the license renewal applications of eight Los Angeles television stations.[25] In her petitions pertaining to the seven commercial licensees Mrs. Gottfried alleged generally that the stations had failed to ascertain or to meet the needs of the hearing impaired. She further argued that the stations, as recipients of valuable federal licenses, had failed to satisfy obligations imposed on them by Section 504 of the Rehabilitation Act of 1973. Regarding the public station KCET-TV, Mrs. Gottfried repeated her general claims and arguments, but she also added the specific charge that the station had shown indifference to the needs of the deaf by failing to broadcast, through most of its license term, a captioned version of the ABC Evening News that was made available to it by the Public Broadcasting Service.[26]

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[23] *Reconsideration, supra* note 4, 72 FCC2d at 278, JA 16.

[24] *Order, supra* note 4, 69 FCC2d at 458-459, JA 8-9; *Reconsideration, supra* note 4, 72 FCC2d at 276-280, JA 14-18.

[25] *See Order, supra* note 4, 69 FCC2d at 451-452, JA 1-2; JA at 29.

[26] *See* JA at 24-28.

On September 8, 1978 the FCC denied Mrs. Gottfried's petitions to deny license renewals to the eight stations.[27] The petitions, the Commission said, had "failed to allege specific facts which raised any substantial or material question as to whether a grant of the renewal applications before us would serve the public interest, convenience, and necessity."[28] The FCC based this conclusion on the failure of the petitions to allege violations of any specific Commission standards or guidelines. The Commission noted that it had no requirement that stations develop demographic data related to the hearing impaired population of a service area, specifically ascertain the needs of the deaf, or utilize captioning or other techniques to make programming accessible to the hard of hearing.[29] The Commission also found that Section 504 of the Rehabilitation Act did not apply to the commercial licensees,[30] and it stated that the Department of Health, Education and Welfare (HEW) was the appropriate agency to consider whether the public station had violated the Act.[31] Although it said that it would give consideration to any adverse finding that HEW might reach, the Commission denied that a petitioner could raise a "substantial or material" renewal question merely by alleging noncompliance with the Rehabilitation

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[27] *Order, supra* note 4, 69 FCC2d at 451, JA 1.

[28] *Id.* at 459, JA 9.

[29] *Id.* at 458, JA 8.

[30] *Id.* at 459, JA 9.

[31] *Id.* Responsibility for issuance of guidelines applying § 504 to public television has since been shifted to the Department of Education. *See* note 22 *supra*. The FCC apparently now considers that Education is the agency responsible for determining statutory violations.

Act or with the national policy expressed by that statute.

The appellants [32] responded to the Commission's order by filing a petition for reconsideration, in which they alleged, in elaborated form, essentially the same arguments they had made earlier.[33] They also filed supplemental pleadings in which they presented evidence that viewers were not averse to captioned programming and claimed that the Commission was obligated by HEW regulations and by Executive Order to implement Section 504 of the Rehabilitation Act.[34] Once again, the Commission dismissed the petition as failing to present a substantial or material question of fact requiring further hearings.[35] Because the petitioners had not effectively challenged the stations' compliance with stated FCC requirements, the Commission held that they had not raised a substantial claim that the licensees' service had failed to satisfy the statutory requirement of being in the public interest.

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[32] The Commission originally determined that Mrs. Gottfried was the only signer of the petitions to deny who had established standing before the Commission. *See Order, supra* note 4, 69 FCC2d at 453, JA 3. But the standing of the Greater Los Angeles Council on Deafness, Inc. (GLAD) was at least implicitly recognized by the Commission in *Reconsideration, supra* note 4, 72 FCC2d 273, JA 11, even though the Commission declined to reverse its earlier standing determination. *See id.* at 280, JA 18. GLAD is before this court as an appellant, together with Sue Gottfried, individually and on behalf of the hearing impaired population within the stations' viewing area.

[33] *See Reconsideration, supra* note 4, 72 FCC2d at 276, JA 14.

[34] *Id.* at 275-276, JA 13-14.

[35] *See id.* at 281, JA 19.

Pursuant to Section 402 of the Communications Act, 47 U.S.C. § 402 (1976), Mrs. Gottfried appealed the decision of the Commission to this court.

II. Issues on Appeal

The issues presented in this appeal are complicated by the contested relationship between two statutes, the Communications Act and the Rehabilitation Act of 1973. The Rehabilitation Act does not directly impose any enforcement obligation on the FCC. But the Communications Act does require the FCC to make determinations about the requirements of the "public interest," and appellants argue that the "public interest" standard must be construed to require at least some consideration of the national policy expressed by the Rehabilitation Act and any legal obligations imposed on the stations by Section 504. We agree.

Because the parties have assumed that Section 504 of the Rehabilitation Act applies to public television stations,[36] we begin by considering the obligation of

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[36] In its brief in this court, *see* brief for appellee at 15-16 & n.9, the FCC states that it had determined to defer to the judgment of HEW on this question, and that "[i]n the case entitled *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California d/b/a KCET-TV, et al.*, Civil No. 78-4715-R (C.D. Cal.), HEW stated that it had determined that Section 504 is applicable to public television stations that receive federal financial assistance." As an intervenor in this court KCET-TV does not expressly concede the applicability of § 504, noting that Congress went to some lengths to assure that programming funded by the Corporation for Public Broadcasting is insulated from federal control and regulation. *See* brief for intervenor Community Television of Southern California at 15 n.7. Significantly, however, KCET-TV does not deny that it is a

the FCC to weigh compliance with this standard in a challenge to renewal of a license such as that involved in this case. This discussion yields the conclusion that the case of the public station must be remanded to the Commission. We then consider the argument that Section 504 applies to the commercial stations, and conclude that it does not. Although the Commission may still be obliged to weigh the national policy of the Rehabilitation Act within the public interest standard, the commercial stations themselves have been assigned no direct statutory obligations to the hearing impaired. We therefore determine that the Commission has a range of discretion in assessing what commercial stations must do in the public interest, and in consideration of both its expertise and its efforts in the area, we defer to its judgment at this time. We repeat, however, that in our view television, both public and commercial, should be made available to persons with impaired hearing now.

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recipient of federal funds channeled to it through the Corporation for Public Broadcasting. Moreover, although it was generally eager to keep public broadcasting free from "governmental interference or control," *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975), Congress not only did not intend to free public broadcasters from all legal standards, *see id.* at 294-296, but actually created some programming standards applicable to public broadcasters only, *see id.* at 291 & n.7. We therefore reject any implied argument that Congress could not have intended federal funds channeled through the Corporation for Public Broadcasting to count as federal financial assistance merely because such a construction would subject recipients to a statutory requirement of nondiscrimination against the handicapped.

The administrative agencies responsible for implementing the Rehabilitation Act have held consistently that § 504 applies to public television broadcasters. *See* note 22, *supra*.

III. PUBLIC STATIONS

Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from * * * participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[37]

In this case appellants urge that public television station KCET-TV is a recipient of federal financial assistance subject to the statute. This claim rests on two bases. First, appellants argue that a broadcast license is itself a valuable commodity constituting "financial assistance" as that term is used under the Rehabilitation Act.[38] Second, appellants argue that KCET-TV, as a "public or noncommercial educational broadcasting station, is subsidized by congressional appropriations channeled, among other sources, through the National Telecommunications and Information Administration of the Department of Commerce and the Corporation for Public Broadcasting.[39]

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[37] 29 U.S.C. § 794 (1976).

[38] This argument is based largely on the proposition that a license to broadcast on the public airwaves is a valuable commodity. *See* brief for appellants at 32-41. Although not explicitly disputing that broadcast licenses possess economic value, the FCC argues that Congress did not intend broadcast licenses to count as "Federal financial assistance" for purposes of applying the Rehabilitation Act. *See* brief for appellee at 15-30.

[39] Under the Educational Broadcasting Facilities Act, 76 STAT. 46 (1962), and the Public Broadcasting Act, 81 STAT. 365 (1967), 47 U.S.C. §§ 390-399 (1976 & Supp. III 1979), as

In its brief in this court the FCC does not dispute the applicability of Section 504 to public station KCET-TV. At the time it was the agency responsible for interpretation of the Rehabilitation Act—and thus at a time when its construction would have been due "substantial deference" from a reviewing court [40]—the Department of Health, Education and

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amended by the Public Telecommunications Financing Act, 92 STAT. 2405 (1978), public or noncommercial educational broadcasting stations, such as KCET-TV, are subsidized by federal appropriations dispensed through the National Telecommunications and Information Administration of the Department of Commerce and/or the Corporation for Public Broadcasting. The Corporation, a nonprofit organization created by federal statute, receives funds directly from the federal treasury, subject to a number of statutory directives and prohibitions concerning how the funds may be spent. *See* 47 U.S.C. § 396 (1976 & Supp. III 1979).

During its 1977 fiscal year, KCET-TV received $2,363,927—more than 18% of its total revenues—from the Corporation for Public Broadcasting. *See* Private Defendants' Proposed Findings of Fact, Statements of Facts as to Which There Is No Genuine Issue, and Proposed Conclusions of Law (Sept. 28, 1979), *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.). In the same year the station also got $495,229 from the Public Broadcasting Service, which in turn is largely funded by the Corporation for Public Broadcasting. KCET-TV's revenues for 1977 also included $2,298,160 in restricted program grants provided directly by various agencies of the federal government. *See* note 44 *infra* and accompanying text.

[40] An administrative interpretation of a statute is due substantial weight from a reviewing court when it reflects "a contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall* v. *Tallman*, 380

Welfare determined that Section 504 applies to public broadcasting stations.[41] The Department of Education, which has now assumed responsibility for developing guidelines applicable to public broadcasters, has apparently accepted this conclusion,[42] and the FCC has indicated a willingness to defer to its judgment.[43]

The case of KCET-TV also exhibits incidence of more direct and traditional "Federal financial assistance." During 1977, the year in which KCET-TV's petition for license renewal was challenged, federal agencies combined to provide the station with $2,298,160—an amount representing roughly 17 percent of its revenues for the year—in restricted program grants.[44] The contributing agencies included the National Institute for Education, which granted

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U.S. 1, 16 (1965) (citation omitted); *see E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134-135 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[41] HEW in fact began to develop compliance guidelines for public broadcasters in October 1979, but it had not completed the task prior to its split into separate Departments of Health and Human Services and of Education in May 1980.

[42] The Department of Education has recently issued a *Notice of Intent to Develop Regulations*. *See* note 22 *supra*.

[43] *See* brief for appellee at 15-16 n.9; *Order*, *supra* note 4, 69 FCC2d at 459, JA 9 ("[I]n the event some adverse finding were made relative to Section 504, the Commission would take whatever action would be appropriate.").

[44] *See* Private Defendants' Proposed Findings of Fact, Statements of Fact as to Which There Is No Genuine Issue, and Proposed Conclusions of Law (Sept. 28, 1979), *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.).

$1,814,090; the National Endowment for the Arts, $461,872; the National Endowment for the Humanities, $18,243; and the United States Information Agency, $3,955. We therefore conclude that Section 504 imposed legal obligations on station KCET-TV during the term of its license preceding the renewal challenge, and we assume that it continues to do so.

There remain, however, important issues concerning the duty of the FCC to define the station's responsibilities under the Rehabilitation Act and to enforce the Act's policies in license renewal proceedings. The FCC is not the agency primarily responsible for enforcing the Rehabilitation Act. Nonetheless, appellants argue that the Act's Section 504 reflects a partial congressional definition of the FCC's obligation to serve "the public interest"—in effect, a specification that the FCC must consider compliance with Section 504's nondiscrimination requirement in determining whether a public broadcaster has satisfied the public interest standard.[45] Second, appellants argue that the FCC is bound to take immediate action to implement Section 504, at a minimum by bringing its policies to bear in renewal proceedings such as this.[46] The FCC, noting that no guidelines have yet been issued by the Department of Education, takes a different view. The Commission asserts that it would be unfair to penalize a station in a license renewal proceeding for noncompliance with a statute for which interpretive guidelines were not in existence during the term of the license.[47]

Under the special circumstances presented by this case, we agree with appellants that the FCC is obli-

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[45] *See* brief for appellants at 47-50.

[46] *See id.* at 51-55.

[47] *Reconsideration, supra* note 4, 72 FCC2d at 279, JA 17.

gated to take account of a public broadcaster's legal duties under Section 504 in making its public interest determinations. Moreover, given the variety of procedural options pursuant to which the FCC could avoid unfair harshness to the broadcaster, we cannot accept that the public television stations need to be regarded by the Commission as free from any enforceable obligations under Section 504 until interpretive guidelines are issued.

A. *Section 504 and the Public Interest Standard*

The FCC is directed to renew broadcast licenses only if it finds that renewal would serve the "public interest, convenience, and necessity." 47 U.S.C. § 309(a) (1976). In construing this standard we must of course accord substantial deference to the Commission's judgments. As the Supreme Court has recently observed, "the 'weighing of policies under the "public interest" standard is a task that Congress has delegated to the Commission in the first instance.' " *FCC* v. *WNCN Listeners Guild*, —— U.S. ——, ——, 49 U.S. L. WEEK 4306, 4310 (March 24, 1981), *quoting FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978). Yet there remains, under the Communications Act, an inescapable judicial role. Although the "public interest" standard requires judgments of policy, *see FCC* v. *WNCN Listeners Guild, supra*, —— U.S. at ——, 49 U.S. L. WEEK at 4310, it also contains an irreducible element of law, *see National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224-226 (1943), which makes judicial review both necessary and possible. *Cf. NAACP* v. *FPC*, 425 U.S. 662, 669 (1976) ("[T]he words 'public interest' in a regulatory statute * * * take meaning from the purposes of the

regulatory legislation."). It is the function of the judiciary to resolve disputed questions of law. *See Internat'l Brhd of Teamsters* v. *Daniel*, 439 U.S. 551, 556 & n.20 (1979).

In their brief in this court appellants argue that the FCC's "public interest" mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under Section 504 of the Rehabilitation Act of 1973. We agree.

We begin with the settled proposition that a federal agency, in construing the requirements of the "public interest" under its governing statute, must at least give weight to federal laws and public policies addressed to similar purposes. *See, e.g., McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944) (Interstate Commerce Commission obliged to weigh policies implicit in Sherman Act); *Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968) (Federal Power Commission, operating under public interest mandate, is "obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations"); *City of Pittsburgh* v. *FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956) (FPC obligation to consider antitrust factors not alleviated by fact that antitrust enforcement generally committed to Attorney General); *Johnston Broadcasting Co.* v. *FCC*, 175 F.2d 351, 357 (D.C. Cir. 1949); *see also FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968) (antitrust laws are tool by which regulatory agency gives "understandable content to the broad statutory concept of the 'public interest'"); *National Broadcasting Co.* v. *United States, supra,*

319 U.S. at 222-224. It makes no difference in such cases that Congress may have vested primary responsibility for enforcement of a statutory policy in another agency. As the Supreme Court has made clear, the grant of enforcement power to one organ of government does not free others to ignore national laws and policies until such time as violations have been proved in the courts. *See, e.g., McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 79-80; *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 222-224.

By its passage of the Rehabilitation Act of 1973 Congress placed public stations under a legal obligation to consider and attempt to serve the interests of the nation's hearing impaired minority. Surely the policy of this statute falls well within the broad purposes of the Communications Act. As the Supreme Court has recognized, the "public interest" standard established by the Communications Act imposes on the FCC an affirmative "obligation * * * to ensure that its licensees' programming fairly reflects the tastes * * * of minority groups." *NAACP* v. *FPC, supra,* 425 U.S. at 670 n.7.

Following Congress' decision that recipients of federal assistance must extend their programs to otherwise qualified members of handicapped minorities, settled legal principles compel the conclusion that the FCC must, at a minimum, weigh this congressional policy in making "public interest" determinations. It is unreasonable to believe that a public station could give service cognizable as being "in the public interest" without at least making efforts to satisfy its statutory obligations.[48]

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[48] In *Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288 (D.C. Cir. 1975), this court held that the Commission lacks juris-

In holding as we do, we do little more than recall the FCC to a position it has itself asserted in the

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diction directly to enforce legal obligations imposed on the Corporation for Public Broadcasting by the Public Broadcasting Act of 1967, 81 STAT. 365 (1967), *as amended*, 47 U.S.C. §§ 390-399 (1976 & Supp. III 1979). Intervenor KCET-TV suggests that this holding rests on the principle that "the programming of noncommercial broadcast stations such as KCET is insulated from federal control and regulation," brief for intervenor Community Television of Southern California at 15 n.7, and that federal money channeled to noncommercial stations through the Corporation for Public Broadcasting should therefore not be construed as "Federal financial assistance" if such a construction would subject noncommercial broadcasters to federal legal controls. This claim rests on a confusion of arguments. *Accuracy in Media* held that the FCC could not directly, by order or otherwise, enforce the obligations imposed on the Corporation for Public Broadcasting by the Public Broadcasting Act. But the case did not hold that public stations were not recipients of federal financial assistance. It did not hold that they were not subject to legal obligations under other federal statutes. *See* 521 F.2d at 294-296. And, most important, it did not hold that the FCC should not indirectly enforce legal obligations, arising under federal statutes other than the Public Broadcasting Act, in licensing proceedings under the public interest standard. *See id.* at 295-296 & n.33. On the contrary, the court was careful to note that "[w]e find nothing * * * which limits established FCC authority * * * over local noncommercial licensees," *id.* at 295, and that "FCC regulation of the educational licensees was seen as the ultimate check on the public broadcasting system," *id.* at 295-296 n.33.

In recognizing the FCC's continuing and undiminished authority to assess compliance with the public interest standard, the *Accuracy in Media* court noted that, under a provision of the Public Broadcasting Act, 47 U.S.C. § 398 (1970), current version 47 U.S.C. § 398 (Supp. III 1979), no agency of government is authorized to "exercise any direction, supervision, or control" over public telecommunications. *See* 521 F.2d at 292 (*quoting* statute). But the court clearly stated

past. The Commission has frequently recognized its obligations under the public interest standard to protect the interests of minority groups previously excluded from full access to broadcast programming. *See, e.g., Nat'l Organization for Women, NYC Chapter* v. *FCC*, 555 F.2d 1002, 1017 (D.C. Cir. 1977) (Commission considers "the employment practices of its licensees *to the extent those practices affect the obligation of the licensee to provide programming* that 'fairly reflects the tastes and viewpoints of minority groups' *and to the extent those practices raise questions about the character qualifications of the licensee*") (emphasis in original; footnotes omitted); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC2d 222 (1976); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 FCC2d 766 (1968). Although the Equal Employment Opportunity Commission was given primary responsibility for enforcement of the discrimination prohibitions of the 1964 Civil Rights Act, the FCC recognized its independent responsibility, pursuant to the public interest standard, to carry out the Act's policy. Its authority to do so has been recognized by the courts. *See, e.g., NAACP* v. *FPC*, *supra*, 425 U.S. at 670 n.7; *Nat'l Organization for Women, NYC Chapter* v. *FCC*, *supra*, 555 F.2d at 1015-1020. And where the Commission has lagged in accepting its responsibility, this court has not hesitated to direct it to do so. *See, e.g., Black Broadcasting Coalition of Richmond* v.

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that the "prohibition against governmental interference is expressly limited to [attempts to enforce] authorizations" contained in the Public Broadcasting Act itself, *see* 521 F.2d at 296, and that the FCC's obligation to uphold the public interest arises from a section of the Communications Act, 47 U.S.C. § 309 (1976), to which the prohibition did not apply.

FCC, 556 F.2d 59 (D.C. Cir. 1977) (*per curiam*); *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966). We do not shirk our duty in the present case.

B. *Required Procedures*

In their brief in this court appellants have asked us to remand the license renewal application of public station KCET-TV for a public hearing and other appropriate proceedings by the FCC.[49] We regard this as the proper disposition.

The FCC has objected that KCET-TV complied with all existing Commission rules, and that there is thus "no substantial and material question of fact" to be determined before final action on the application.[50] But, as this court has held before, "Under Section 309(e) the Commission must set a renewal application for hearing where 'a substantial and material question of fact is presented *or* the Commission for any reason is unable to make the finding' that the public interest, convenience, and necessity will be served by the license renewal." *Office of Communication of United Church of Christ* v. *FCC*, *supra*, 359 F.2d at 1007 (emphasis in opinion of Burger, J.; citation omitted).

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[49] *See* brief for appellants at 51-53. The FCC understands appellants to argue that the Commission is obligated to impose specific requirements of program captioning on all of its licensees. *See* brief for appellee at 38-39. Even if we believed appellants to be urging such a claim, we would need to reject it at this time, as prematurely interfering with the Commission's discretion to determine what accommodations to the deaf can reasonably be required of licensees under the public interest standard. *See* text accompanying notes 51-52 *infra*.

[50] *Order*, *supra* note 4, 69 FCC2d at 459, JA 9; brief for appellee at 30-40.

Finding that Congress must be understood to have prescribed that the "public interest" encompasses at least the legal interests of the nation's hearing impaired minority, we do not believe that a Commission decision in which this factor has not been weighed can escape condemnation as "arbitrary, capricious, [or] an abuse of discretion."[51] As the Supreme Court held in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1972), satisfaction of this standard requires, at a minimum, "consideration of all relevant factors."

The task of weighing the interests of the hearing impaired is not an easy one, and we do not presume to intrude into the Commission's range of discretion in this difficult area. It is appropriate, however, for us to respond to some of the concerns that the Commission has raised on this appeal.

These concerns arise primarily from the ambiguity of the legislative policy expressed in Section 504. In construing this provision the responsible administrative agencies have concluded that Congress intended recipients of federal funds to make "reasonable accommodations" to provide service to handicapped persons, *see* 45 C.F.R. § 84.12 (1977) (HEW guidelines), current version 34 C.F.R. § 104.12 (1980) (Department of Education guidelines), and the courts have generally accepted this construction, *see, e.g., United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977) (cause remanded to District Court for application of guidelines); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977) (same). But, as the Supreme Court acknowledged in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 412 (1979), the line between

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[51] 5 U.S.C. § 706(2)(A) (1976).

lawful refusal to extend affirmative action and illegal discrimination will not always be clear.

Emphasizing the difficulty of line-drawing in this area, the Commission pleads that it has no choice but to stay its hand. The Department of Education is currently engaged in preparation of interpretive guidelines construing the obligations that Section 504 imposes on public broadcasters.[52] Pending completion of those guidelines the FCC has said that it has no basis for assessing compliance with the statute, and that there would be nothing for it to consider in the public hearing requested by appellants. We do not agree.

In pursuing the public policy presented by Section 504 it is not the function of the FCC to adjudicate law violations, or, indeed, to regard itself as bound strictly by the specific dictates of the Rehabilitation Act or interpretive guidelines issued thereunder. *See, e.g., California* v. *FPC*, 369 U.S. 482, 490 (1962); *United States* v. *Radio Corp. of America*, 358 U.S. 334, 350 (1959). The Commission's responsibility is rather to effectuate the underlying national policy of providing federally assisted programs, including public television, to handicapped persons, such as the deaf, who are capable of benefitting from them.

In effectuating a policy that is currently framed in general terms only, the FCC must of course proceed with sensitivity to the situation of its licensees. In its review of KCET-TV's renewal application the Commission can appropriately consider the station's uncertainty about the precise requirements imposed on it by Section 504. It would indeed be unfair to insist on strict compliance with a standard developed

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[52] It remains unclear, however, when the guidelines will be completed. *See* note 22 *supra*.

after the fact, and we expect the FCC neither to develop nor to apply a fully formulated set of guidelines at this time. Nonetheless, it is clear to us that the absence of interpretive guidelines—either now or during the station's license term—could not justify a licensee's disregard of or indifference to the policies of the statute. Eight years after the passage of the Rehabilitation Act, we cannot accept that a public station still has no duty to make reasonable efforts to serve the handicapped, or that this duty cannot be enforced, in an agency proceeding, by an intended beneficiary of the statute. The Commission must therefore proceed immediately to inquire at least into the station's good faith, as manifest in its efforts to provide service in accord with the legislative policy goals of Section 504.

The Commission has also argued that it would be unfair for the issues at the heart of this case to be raised for the first time in a license renewal proceeding.[53] During the term of its license KCET-TV lacked clear standards defining the level of service required by Section 504. And in the absence of prior notice of the FCC's renewal policy, the Commission argues, it would be wrong to penalize a station for its shortcomings.

Our answer to this argument is implicit in what we have said before. Properly conducted, an FCC inquiry will impose no unreasonable burden on the station. Focusing primarily on good faith efforts to interpret and follow statutory policies, it should not enforce numerical criteria on a retroactive basis, but instead assess the station's willingness—as measured against its capacity and its viewers' need—to provide programming for the aurally handicapped.

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[53] *See* brief for appellee at 38-39.

As the Commission itself has asserted repeatedly, the predominant concern in a license renewal case may be "prospective, seeking to lead a licensee who has not posessed an adequate * * * program in the past to adopt policies ensuring" better performance in the future. *Nat'l Organization for Women, NYC Chapter* v. *FCC, supra*, 555 F.2d at 1017, *quoting Nat'l Broadcasting Co.*, 58 FCC2d 419, 422 (1976); *see Bilingual Bicultural Coalition of Mass Media, Inc.* v. *FCC, supra*, 595 F.2d at 628 & n.24. Consistent with that concern, in a case such as this the FCC may choose among a variety of dispositional alternatives, including short-term or conditional license renewal, as well as standard renewal or denial. We intimate—because we hold—no *a priori* preference among them. The ultimate decision is obviously not for us, but for the Commission,[54] with its

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[54] Appellants seem at some points in their brief to suggest that there can be no discretion in this matter, because the First Amendment protects the right of all segments of society to have access to programming over the public airwaves. *See* brief for appellants at 55-57. From this premise they appear to deduce a right to have broadcast programming captioned for the hearing impaired. Even if the First Amendment entitles the hearing impaired to have access to some minimum of programming over the airwaves, however, we could not accept that it requires all stations to make their programming accessible to all deaf persons all of the time. *Cf. Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Committee*, 412 U.S. 94, 96 (1973) (frequency scarcity makes it infeasible for all persons wishing to speak to have access to the air). In demanding fair access to the public airwaves for the hearing impaired, the First Amendment, in our view, sweeps no more broadly than the public interest standard of the Communications Act, under which we are

special expertise concerning what can reasonably be expected of a public broadcaster within the context of current technology and current needs.

We recognize the indefiniteness with which our prescriptions are stated. The guidelines promised by the Department of Education will hopefully resolve many of the uncertainties confronting the stations, the Commission, and this court. But we reiterate our strong view that no guidelines are needed to identify the outlines of Congress' policy aims. The Commission—like the stations—must accept its duty now. There are many ways in which the policy of Section 504 of the Rehabilitation Act might be implemented. We hold only that it cannot be ignored.

IV. Commercial Stations

A. *Section 504 and Federal Licenses*

Appellants argue that the seven commercial stations involved in this case are also bound by Section

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unprepared to demand a specific, substantive interpretation from the Commission at this time.

Intervenors in this court have also lodged a First Amendment argument on behalf of the licensees: the argument that any captioning requirement the FCC might impose would violate protected rights of the broadcasters by regulating the "content" of their programming. *See* joint brief for intervenors American Broadcasting Companies, Inc.; Golden West Broadcasters; KCOP Television, Inc.; Metromedia, Inc.; National Broadcasting Co.; and RKO General, Inc at 47-51. We find this argument to be without merit. A captioning requirement would not significantly interfere with program content. And in cases of more limited regulations such as those likely to come in issue it is well established that the Commission may constitutionally condition licenses on a station's provision of programming in the public interest. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390-392 (1969); *Nat'l Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-227 (1943).

504 of the Rehabilitation Act, and that the FCC must therefore assess their compliance with the statute in considering applications for license renewal. We are unable to accept this argument in the terms advanced by appellants.

Section 504 directly imposes legal obligations only on recipients of "Federal financial assistance." Appellants correctly argue that a license to broadcast on the public airwaves is a commodity of great value.[55] But this does not resolve the question of congressional intent: Did Congress intend broadcast licenses to count as "financial assistance" within the meaning of Section 504? We are unable to conclude that it did.

The first reason arises from the statute's legislative heritage. Section 504 of the Rehabilitation Act was expressly modeled on Section 601 of Title VI of

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[55] Appellants cite an article, Levin, *Economic Effects of Broadcasting Licensing*, 72 J. POL. ECON. 151 (1964), in which it was estimated, as long ago as 1964, that the average value of a VHF license exceeded $1,500,000. *See* brief for appellants at 33-34. That figure was based on calculations of the difference between the sale price of stations actually sold and the replacement cost of the stations' material facilities. Whatever the actual figure, there can be no doubt that the broadcast licenses contested in this case possess great value. In the Los Angeles market, which comprises approximately 10 million people, the FCC grants only 13 commercial licenses to television broadcasters. And Los Angeles is the most profitable market in the country. *Broadcasting Magazine*, July 30, 1979, at 46-47. *Cf. Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (broadcast license constitutes "valuable privilege"); *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Committee, supra* note 54, 412 U.S. at 174 n.5 (Brennan, J., dissenting) (free license is functional equivalent to "Government subsidization of broadcasters").

the Civil Rights Act of 1964.[56] And although the legislative history of Section 504 is sparse, we find ample evidence to conclude that Congress did not intend Title VI to reach the recipients of licenses from the FCC. This evidence includes congressional hearings and floor debates, in which various speakers interpreted the language as applying to "funds" [57] and "public moneys out of the Federal Treasury," [58]

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[56] *See* S. Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted at* [1974] U.S. Code Cong. & Ad. News 6373, 6390 ("Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964"); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277, 1280 & n.9 (7th Cir. 1977); 119 Cong. Rec. S6144-S6145 (daily ed. March 1, 1973) (remarks of Sen. Humphrey, indicating that § 504 represented substitute for amendments to Title VI to protect the handicapped). Congress reiterated its intent in 1978 when it adopted the Rehabilitation, Comprehensive Services and Development Disabilities Amendments, Pub. L. No. 95-602. Section 120 of the Amendments, § 505(a)(2) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(2) (Supp. III 1979), points explicitly to Title VI as a model for § 504:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this [Act].

[57] *See, e.g., Civil Rights: Hearings before the House Judiciary Committee*, 88th Cong., 1st Sess. 2731 (1963) (statement of Attorney General Robert F. Kennedy) ("It is going to be every program of the Federal government where Federal funds are expended.").

[58] *See, e.g.*, 110 Cong. Rec. S6430 (daily ed. March 26, 1964) (transcript of televised remarks of Sen. Humphrey) ("What it merely says is that public moneys out of the Federal Treasury will not be used to promote discrimination * * *.").

and none apparently referred to federal licenses.[59] It also encompasses authoritative interpretations of the Civil Rights Act developed by the Attorney General both before and after the measure's passage. In anticipation of the congressional debate Congressman Celler asked the Justice Department to supply a list of federal programs and activities that would fall within the ambit of Title VI.[60] Duly prepared by the Deputy Attorney General, the list that appeared in the Congressional Record of June 10, 1964 included no reference to the FCC or to any other government program involving issuance of federal licenses.[61]

The Justice Department reiterated its interpretation after the Civil Rights Act had become law. Designated to develop interpreting regulations, the Department undertook to aid all affected agencies to formulate standards to implement Title VI. Yet it found no need for the issuance of regulations by the

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[59] Not even opponents of the 1964 Civil Rights Act, who frequently criticized the measure on account of what they considered its excessively broad sweep, *see, e.g., Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, reprinted at* [1964] U.S. Code Cong. & Ad. News 2341, 2433 (bill "constitutes the greatest grasp for executive power conceived in the 20th century"), suggested that issuance of a federal license would subject licensees to Title VI. For example, Congressmen Poff and Cramer, who filed separate minority views, listed existing federal programs that "apparently would be embraced." *See Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer, reprinted at* [1964] U.S. Code Cong. & Ad. News 2471, 2471-2472. None of the programs contained on their list involved federal licensing. *See id.*

[60] *See* 110 Cong. Rec. H13380 (daily ed. June 10, 1964).

[61] *See id.* at H13380-H13382.

FCC.[62] The Justice Department's contemporaneous construction of the statutory term "Federal financial assistance" deserves substantial weight in this court, both because of the Department's close involvement in the drafting of the Civil Rights Act and because of its status as the agency responsible for "setting the [Act's] machinery in motion." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134-135 (1977).

The agencies responsible for implementation of the Rehabilitation Act have followed the pattern of construction established under the Civil Rights Act. They too have regarded broadcast and other licenses as falling outside the statutory meaning of the term "Federal financial assistance." Neither HEW nor the Department of Education has thought it necessary to issue regulations applicable to commercial broadcasters.[63] And regulations issued by the Justice

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[62] The Justice Department remains responsible for coordination and implementation of Title VI, *see* Executive Order 11764 (Jan. 24, 1974), 3A C.F.R. 124, and it has at no time issued, or asked the FCC to issue, regulations governing recipients of broadcast licenses.

[63] HEW was charged by Executive Order 11914, 41 FED. REG., 17871 (April 28, 1976), with the task of issuing general regulations for the guidance of all federal agencies providing financial assistance encompassed by § 504. It developed an expansive definition of financial assistance:

> (h) "Federal financial assistance" means any grant, loan, contract * * *, or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:
>
> (1) Funds;
>
> (2) Services of Federal personnel; or

Department, which has recently been designated by Executive Order as the agency responsible for coordinating federal efforts to implement the Rehabilitation Act,[64] hold specifically that federal licensees are not bound by Section 504.[65] We note also that the

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(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

45 C.F.R. §§ 84.3(h) & 85.3(e) (1979). Relying on the breadth of the HEW definition, appellants cite that agency's interpretation in support of their position. *See* brief for appellants at 28-31. Significantly, however, HEW never explicitly classified broadcast licenses as financial assistance, nor did that agency ever issue regulations specifically applicable to commercial broadcast licensees or ask the FCC to do so. The Department of Education, which has now assumed responsibility for issuing interpretive guidelines applicable to public broadcasters, has given no indication that it regards § 504 as applying to commercial licensees.

[64] *See* Executive Order 12250, 45 FED. REG. 72995 (Nov. 4, 1980).

[65] *See Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914*, 45 FED. REG. 37620, 37632 (June 3, 1980) ("The term 'Federal financial assistance' * * * does not include licenses, for example, since licenses are not Federal assistance grants, contracts, loans, or cooperative agreements."). The Justice Department guidelines were intended to apply only to federally funded programs administered by the Department of Justice. Since their issuance, however, the Department has been designated as the agency primarily responsible for coordinating and implementing federal compliance with § 504. *See* Executive Order 12250, 45 FED. REG. 72995 (Nov. 4, 1980).

Justice Department's interpretation accords with the FCC's construction of the Communications Act of 1934, under which licenses are not regarded as establishing property rights,[66] even though licensees do enjoy a limited renewal expectancy.[67]

B. *Public Interest Obligations*

In denying appellants' claim that the FCC committed reversible error in failing to hold the seven commercial stations to specific obligations under Section 504, we are not unmindful that the FCC functions under a statutory obligation to make findings about the public interest, and that the Rehabilitation Act of 1973 may evidence a general national policy of considering the concerns of the deaf within the public interest rubric,[68] even where direct legal obligations

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[66] *See Reconsideration, supra* note 4, 72 FCC2d at 277, JA 15. The Commission bases its construction on the plain language of the Act, which states expressly that "no [broadcast] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301 (1976). The Supreme Court has also held that Congress intended the Commission's grant of a license to create no property rights. *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 331-332 (1945); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

[67] *See, e.g., FCC* v. *Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 805 (1978); *Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37, 61 (D.C. Cir. 1978) (*per curiam*) (petition for rehearing).

[68] *Cf.* text and notes at notes 48-52 *supra; Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC2d 766, 769 (1968):

> There is [a] National policy against discrimination in hiring. And here we note that this is a National policy. The 25-employee prescription in the Civil Rights Act

are not imposed. Indeed, the FCC itself has sometimes suggested that it could not, consistent with its statutory mandate, ignore the wants and needs of minorities that national policies aim to protect.[69]

Because of the national policy of extending increased opportunities to the hearing impaired, we believe that some accommodations for the hard of hearing are required of commercial stations, under the general obligation of licensees to serve "the pub-

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does not limit that National Policy, and specifically, "title VII was not intended to circumscribe the authority of Federal agencies other than the Equal Employment Opportunity Commission to regulate employment practices." (See letter of Assistant Attorney General Pollak, app. A, pp. 2-3.) Second, there is the consideration that broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license. When these two considerations are taken together—the National policy against discrimination and the nature of broadcasting—we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National policy. In this respect—a mass media service to the public which is based entirely on a Federal license under a public interest standard—the situation clearly parallels the Federal policy in contract awards. * * *

[69] *See The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC2d 917, 919 (1970) (expressing concern about needs of hearing impaired and noting that if stations do not voluntarily provide better service "it may be necessary to begin rule making looking toward the adoption of minimum requirements"); *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC2d 766, 769 (1968) (*quoted* in note 68 *supra*).

lic interest, convenience, and necessity." But in the absence of specific statutory obligations directed at the commercial broadcasters,[70] we conclude that it would not be appropriate for us to delineate standards for the commercial stations or to require specific Commission procedures at this time.

In its brief in this court the Commission rehearses a series of efforts that it has encouraged and licensed from 1970 to the present.[71] It represents that it is moving forward in this area, and that it will continue to do so.[72] Recognizing that the Commission

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[70] In its *Notice of Intent to Develop Regulations*, *see* note 22 *supra*, the Department of Education seems to hold open the possibility that at least some commercial stations may air programs that are produced with federal assistance, and that they may therefore be subject to statutory obligations under § 504 of the Rehabilitation Act. *See* 46 FED. REG. 4954, 4955 (Jan. 19, 1981). Because receipt of assistance of this kind has not been alleged as a basis for the existence of statutory obligations in this case, no such issue is before us. We hold only that broadcast licenses do not by themselves constitute "Federal financial assistance" within the meaning of § 504.

[71] Brief for appellee at 3-6. Some of the Commission's efforts are described at notes 12-19 *supra* and accompanying text.

[72] The Commission has expressed especially high hopes for the closed captioning program initiated in March 1980, pursuant to which PBS, NBC, and ABC are making available approximately 20 hours of "closed captioned" programming per week. *See Reconsideration*, *supra* note 4, 72 FCC2d at 281, JA 19:

> [W]e are satisfied that important advances are being made toward achieving the goals which petitioners espouse and which we share—namely, the access of the aurally handicapped to the medium of television. We expect that the closed captioning project will be a success. However, if at a later date it is demonstrated

possesses special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace,[73] we defer today to its judgment. However, should the Commission fail to fulfill its obligations to the nation's hearing impaired minority, as we have indicated above,[74] judicial action might become appropriate at a later date.

In consideration of the Commission's representations of good faith and active concern, together with the record on which it based its decisions to renew the licenses of the seven commercial stations, we con-

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> that the project is not successful in making television programming more available and enjoyable to the hearing impaired, then it may be necessary for the Commission to determine if a rulemaking is warranted to ensure that the hearing impaired are not deprived of the benefits of television.

(Footnote omitted.) The Commission made similar representations in oral argument before this court.

[73] In the analogous case of establishing compliance guidelines for public stations under § 504, the Department of Education has asserted that at least the following factors must be taken into account: (1) costs of making broadcasting available to the hearing impaired; (2) alternative ways of distributing any costs incurred; (3) possible standards other than a requirement that all programming should be accessible to the hearing impaired; (4) attitudes of the general public toward open captioning and cameo signing; (5) the state of existing technology. *See* "Declaration of Cynthia G. Brown, Assistant Secretary for Civil Rights, Department of Education," accompanying Defendants' Motion to Modify Order of March 20, 1980, *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California, d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.).

[74] *See* discussion at pp. 4, 14-15, 34-35 *supra*.

clude that the action of the Commission with respect to the commercial broadcasters should be affirmed.

V. Conclusion

For the reasons stated in this opinion, those portions of the Commission's order denying appellants' application to deny license renewal to public station KCET-TV are vacated and remanded to the Commission for further proceedings, and those portions of the order that concern the seven commercial stations are affirmed.

So ordered.

MCGOWAN, *Chief Judge, concurring in part and dissenting in part:* Petitions to deny renewal of license were filed in this case with respect to seven commercial television stations, and one non-commercial public educational licensee, in the Los Angeles area. The opinion for the court affirms the FCC's action in disallowing such petitions—and renewing the licenses for the maximum permissible term—in the case of the seven commercial licensees. I concur in that result, but in doing so I cannot be unaware of the vastly different burden imposed on the educational station by reason of the court's remand for hearing of the petition to deny directed to the renewal of its license.

The licensing period in question, by reference to which renewals were sought, is the same for each of the eight stations, namely, 1974 to 1977. The differing treatment by this court of the petitions to deny renewal beyond that period results because of the court's holding that the non-commercial station, KCET-TV, is receiving financial assistance from the federal government within the meaning of § 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357, *as amended*, 29 U.S.C. § 794 (1976), whereas the seven commercial stations are not. Although the court expressly states that, by reason of the "public interest" standard contained in the Federal Communications Act, it does not regard the latter stations as home free from licensee renewal challenges in the future from representatives of the hearing-impaired, it expressly notes that rulemaking, as distinct from license renewal proceedings, "might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing."

I agree, but I would not, in disposing of this case, limit that principle to commercial stations. It also comports with the steps that have been taken to implement § 504 of the Rehabilitation Act. The Executive Branch of the Government, generally charged by the Constitution with enforcement of laws enacted by Congress, in 1976 assigned the responsibility for developing compliance standards for § 504 to the Department of Health, Education, and Welfare. The Department at length concluded that § 504 was applicable to non-commercial broadcast licensees, and it directed that its Office of Civil Rights develop compliance standards for such licenses. Under the Department of Education Reorganization Act, Pub. L. No. 96-88, 93 Stat. 691 (1979), the newly-created Department of Education took over that responsibility; and the HEW study group involved in preparing compliance guidelines for public TV licensees was transferred to it.

On January 19, 1981, the Department of Education issued a Notice of Intent to Develop Regulations relating to the rights of access of the hearing-impaired to television programs, 46 Fed. Reg. 4954, inviting comments by March 5, 1981.[1] The Federal

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[1] In addition to seeking denial of license renewal by the FCC, appellants have been simultaneously pursuing a suit in the United States District Court for the Central District of California seeking (1) to enjoin KCET-TV from broadcasting any program that is not open-captioned and (2) to cut off the distribution of federal funds to KCET-TV. Civil No. CV-78-4715-R (C.D. Cal.). The District Court after trial, on March 20, 1980 ordered the Department of Education to issue final regulations not later than November 17, 1980. The District Court on November 24, 1980 modified its order so as to enlarge the time until February 17, 1981. The Court of Appeals for the Ninth Circuit, on December 19,

Communications Commission represents that, when such guidelines become available, it stands ready to take them fully into account in subsequent license renewal proceedings. And obviously the relevance of such guidelines in defining "the public interest" in the case of commercial license renewals will be very great indeed, even if they should be confined in terms to non-commercial stations.

Pending the issuance of such guidelines, I do not see why the benefits of their prospective operation should not extend to all licensees seeking renewal, commercial and non-commercial alike. Although it may be true, as we hold today, that the "financial assistance" from the Federal Government contemplated by the Congress in the Rehabilitation Act does not comprehend the existing free use of the publicly-owned airwaves by all licensees, form is favored over substance when commercial stations are, for this reason, spared the expense and uncertainty of renewal hearings, and a non-commercial station is not. Neither, on the record before us, had advance notice during their expired license terms of what was, and therefore could reasonably be, expected of them with respect to the wholly laudable, but technically complex, objective of providing access for the hearing-impaired.

1980, stayed the order as modified pending appeal. It also directed the appeal to be expedited, and calendared for hearing as soon as practicable after the appellee's brief is filed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-1722

SUE GOTTFRIED, individually and on behalf of the deaf and hearing impaired population within the Stations' viewing area, and the GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

NATIONAL BROADCASTING COMPANY, INC., ET AL., INTERVENORS

Filed Jul. 8, 1981

Before: Wright and McGowan, Circuit Judges and Gasch*, Judge, United States District Court for the District of Columbia

ORDER

On consideration of the motion of intervenor Community Television of Southern California for leave to file supplement to petition for rehearing and suggestion for rehearing *en banc*, it is

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ORDERED by the court that the Clerk is directed to file intervenor's lodged supplement and on consideration of the petitions for rehearing of appellee and of intervenor, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,

By /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge McGowan would grant the petition for rehearing.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-1722

SUE GOTTFRIED, individually and on behalf of the deaf and hearing impaired population within the Stations' viewing area, and the GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

NATIONAL BROADCASTING COMPANY, INC., ET AL., INTERVENORS

Filed Jul. 8, 1981

Before: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of appellee and intervenor have been circulated to the full Court. A majority of the Court have not voted in favor of the suggestions. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestions of appellee and intervenor are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges MacKinnon and Robb would grant the suggestions for rehearing *en banc*.

APPENDIX D

FCC 78-599

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN RE LICENSE RENEWAL APPLICATIONS OF CERTAIN TELEVISION STATIONS LICENSED FOR AND SERVING LOS ANGELES, CALIFORNIA

MEMORANDUM OPINION AND ORDER

(Adopted: August 8, 1978;
Released: September 8,1978)

BY THE COMMISSION: COMMISSIONER WASHBURN ABSENT.

1. The Commission has before it for consideration individual petitions to deny the 1977 renewal applications of eight television stations licensed to Los Angeles, California,[1] filed by Sue Gottfried individually and on behalf of the deaf and hearing impaired population within the stations' service areas as well as other organizations and individuals.[2]

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[1] *See* Greene County Planning Bd. v. FPC, 559 F.2d 1227, 1237 (2d Cir. 1977) (*En banc*), *cert. denied*, 434 U.S. 1086, 98 S. Ct. 1280 (1978) *reaffirming* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

[2] The petitions set forth that Ms. Gottfried is joined by the Greater Los Angeles Council on Deafness, Inc. (GLAD) and its component organization; California Association of the Deaf, Long Beach Chapter, California Association of the Deaf, Riverside Chapter; California Association of the Deaf, San Fernando Valley Chapter; California State University, Northridge; CSUN Jewish Outreach; Children's Hear-More Insti-

2. Except for some additional allegations made specifically against Station KCET-TV, the petitions are identical.[3] As basis for the renewal challenges, it is contended that the licensees' ascertainment efforts were defective especially as to the deaf and hearing impaired community, their past programming did not meet the needs of the deaf population, and the sta-

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tute; D.E.A.F. Media, Inc., Southern California Branch; Ear Research Institute; East Los Angeles College, Special Education; El Camino College, Special Education; Ephpheta Society of the Deaf; First Baptist Church of Van Nuys; Golden West College, Hearing Impaired Program; Greater Los Angeles Deaf Women's Bowling Association; Hebrew Association of the Deaf; John Tracy Clinic; La Fiesta Club of the Deaf; La Puente Valley Vocational Center; Little Company of Mary Hospital, Audiology Center; Long Beach Club of the Deaf; Los Angeles City Schools, Special Education Division; Mental Health Program for the Deaf, Saint John's Hospital; Metropolitan Cooperative Library System; Newcastle School, Hearing Impaired Parent Group; Pasadena City College; Photo-Schools Films, Inc.; Pilgrim Lutheran Church of the Deaf; Pilgrim Tower; San Gabriel Valley Club of the Deaf; Santa Ana Guild for the Deaf; Selaco-Downey High School; Southern California Registry of Interpreters for the Deaf; Southern California Ski Club for the Deaf; Southern California Women's Club of the Deaf; Southwest Oral Deaf Adults; Temple Beth Solomon of the Deaf; and Valley Seniors Club of the Deaf; and several hundred area residents who signed petitions against each of the licensees which were consolidated into the applicable petition. These "petitions" were actually phrased as informal objections and included basically the same ascertainment and programming allegations made in the Gottfried pleading. Subsequent to the filing of the petitions, other copies of the same objection were submitted with additional residents' signatures.

[3] Other than the KCET-TV petition, the pleadings against the licensees vary only as to the number of appendices and the number of signatures thereon.

tions violated federal law—i.e., Section 504 of the Rehabilitation Act of 1973—in not offering programming understandable to the aurally handicapped.

3. The licensees, in opposition, urge that the pleadings directed against their renewals be dismissed because of their failure to comply with the applicable statutory requirements so as to qualify as petitions to deny. They contend that the pleadings do not contain specific allegations of fact to demonstrate that petitioners are parties in interest or that a grant of the renewal applications would not be in the public interest. The licensees further assert that the several hundred individual signers did not supply requisite affidavits nor did GLAD or any of its listed component organizations. Also, according to exhibits supplied by several licensees, some of the component organizations formally disavowed any association with the petition.[4] While acknowledging that Ms. Gottfried submitted an affidavit in support of the petition, it is contended that she failed to establish herself as a party in interest by either representing that she is a resident of the community or a listener or viewer of the stations involved. Finally, licensees contend that Gottfried has not alleged in her affidavit that she has personal knowledge of the facts set forth in the pleadings.

4. In response to the oppositions, Gottfried submitted another affidavit wherein she set out her residence as being within the service area of the challenged facilities and points out that because of her deafness she is unable to hear or understand tele-

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[4] The John Tracy Clinic, Pasadena City College, and California State University, Northridge, formally notified the licensees that their institutions had not authorized participation in the renewal challenges.

vision. Additionally, the reply contained an affidavit from Marcella M. Meyer, GLAD's Executive Director, which stated that she is "personally familiar with all of the organizations listed in the Petition, and each of them is directly interested in the problems of the deaf and hearing impaired." However, her affidavit does not support Gottfried's contention that the forty component organizations of the GLAD umbrella formally back the petition and should be considered petitioners. Moreover, it does not even serve to establish GLAD as a petitioner or informal objector.[5]

5. The requirements for petitions to deny as mandated by Section 309(d)(1) of the Communications Act of 1934, as amended, are that the petitioner must set forth specific allegations of fact to show that they are parties in interest and that a grant of the renewal application would not be in the public interest. Such allegations must be supported by affidavit of a person or persons with personal knowledge of such facts.

6. What we have before us is one timely-filed affidavit which does not establish standing and one late-filed affidavit that would serve to satisfy the defects of the initial one. Although the licensees have characterized these pleadings as "blanket" petitions, we believe that a good-faith effort has been made by Gottfried to comply with our procedural

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[5] The only indication we have that GLAD wanted to participate in a challenge of the eight licensees came in an October 14, 1977, letter to the Commission from the president of GLAD, Leonard J. Meyer. Therein he stated that the unbrella organization "has authorized Mr. Abraham Gottfried to represent us in filing an objection to the renewal of licenses" of the Los Angeles Television stations. Mr. Gottfried is the husband of Sue Gottfried and the attorney who assisted in the filing of the petitions.

rules and, therefore, we will accept the second affidavit *nunc pro tunc*. See *Meyer Broadcasting Co.*, 20 FCC 2d 532 (1969). However, Ms. Gottfried is the only party who qualifies as a petitioner. Those members of the public who signed the numerous petitions that were filed with the Gottfried pleadings and subsequent thereto will be considered as informal objectors pursuant to Section 1.587 of the Commission's Rules and Regulations. Because of the uncertainty of GLAD's intentions in this matter, we will not consider it or its component organizations as participating herein.

7. As noted above, while filed individually against each of the eight licensees, the separate pleadings before us are virtually identical. The licensees urge that the "blanket" nature of the petitions fails to supply a sufficient degree of specificity to warrant any Commission consideration. We must agree with the licensees as to most of the allegations and they will be summarily disposed of below. On the other hand, we feel that certain of the allegations, in light of our often stated concern for the deaf and hearing impaired's involvement in television, should be explored herein.

8. Before discussing the merits of the challenges, we believe that a brief background discussion of the Commission's actions regarding television licensees and the nation's hearing impaired would be helpful.

9. In 1970, the Commission issued a Public Notice that was distributed to all television licensees advising them of the special needs of the hearing impaired regarding information concerning emergency situations as well as news, information, and entertainment programming. *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC 2d 917 (1970). Pointing out that radio provided an im-

portant service to the visually handicapped, the Commission noted how well suited television is to provide a similar service to the deaf and hearing impaired. Accordingly, it was suggested that television stations could make use of visual as well as oral announcements of emergencies, utilize the fact of newscasters wherever possible so as to permit lip reading, and feature visualization of materials in news, weather, and sports programs. The Commission hoped that the notice would alert licensees to our concern for the needs of the hearing impaired citizen and make television a truly valuable medium for that segment of the population—estimated by the Department of Health, Education, and Welfare to include 13.4 million persons. We observed, however, that "it may be necessary to begin rule making looking toward the adoption of minimum requirements."

10. In 1972, the Commission granted authority to the Public Broadcasting Service (PBS) to begin experimentation in "closed" captioning utilizing the vertical blanking space of Line 21 of the television broadcast signal. Through the use of an encoder at the transmitting end and a decoder at the receiving end, this closed captioning system could supply visual information—captioning—of the aural portion of the television program to those hearing impaired persons whose television sets were equipped to receive the captioned information while the rest of the viewing public would receive the normal visual and aural transmission. This differs from "open" captioning utilized, for example, by PBS in its rebroadcast of the *ABC Evening News*. Open captioning is transmitted to all viewers who see a printed display of the text of the aural transmission at the bottom of the visual transmission.

11. Other than the PBS experiment, progress in providing a more viable information medium for the

hearing impaired was disappointing. As a result of their experiment, PBS filed a Petition for Rulemaking (RM-2616) requesting an amendment of Subpart E of Part 73 of the Commission's Rules and Regulations to provide that Line 21, Field 1, and the available half of Line 21, Field 2, of the television vertical blanking interval be reserved for the transmission of captioned information for the deaf. Prior to the adoption of a report and order in that proceeding—Docket 20693—we adopted Section 73.675 of our rules which requires television licensees to broadcast emergency information both aurally and visually or only visually. *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, 61 FCC 2d 18 (1976), *recon. granted*, 62 FCC 2d 565 (1977).

12. In concluding Docket 20693 in 1976, the Commission determined that there were too many unanswered questions—technical and financial—and that at least for the present the proper approach in the matter was to not reserve Line 21 for the exclusive use of closed captioning of information for the deaf but to permit such captioning. *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, 63 FCC 2d 378 (1976). Further, the Commission expressed the belief "that licensees can and will be responsive to the needs of its viewers, but it is still the responsibility of each licensee to determine how it can most effectively meet those needs." Thus, there is no requirement that any television licensee—commercial or noncommercial—provide open or closed captioning or any other form of special visual program material other than for broadcasting emergency information.

Ascertainment

13. Generally, petitioner asserts that none of the licensees followed Commission requirements to conduct continuous ascertainments of the community's problems, needs, and interests nor did any of the licensees utilize principals or management level employees at least 50% of the time in conducting the community leaders survey. However, no support is offered and, in view of the general nature of the allegations, we need not consider them further. Similarly, we note that despite Ms. Gottfried's contention to the contrary, there is no reqirement in *Ascertainment of Community Problems by Broadcast Applicants (Renewal Primer)*, 57 FCC 2d 418 (1976), *Ascertainment of Community Problems by Noncommercial Broadcast Applicants, Permittees, and Licenses (Noncommercial Primer)*, 58 FCC 2d 526 (1976), or elsewhere that demographic data relating to an area's hearing impaired population need be included in a renewal application with a station's ascertainment information.[6]

14. Additionally, it is urged that each of the stations failed to evidence a general public survey but, if any were completed, they did not include the hearing impaired. Licensees are only required to place the

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[6] Previously, under the *Primer on Ascertainment of Community Problems by Broadcast Applicants (Primer)*, 27 FCC 2d 650 (1971), commercial licensees were required to compile and submit a compositional survey of their community. In its place, the *Renewal Primer* requires only the maintenance in the public file of a listing of the demographic aspects including total population figures and numbers and proportions of males, females, minorities, youth, and the elderly. Similarly, noncommercial television stations under the *Noncommercial Primer* are only required to place such demographics in their public file.

results of the completed public survey in the station's public inspection file and certify that fact on the renewal application. We have no indication that this procedure was not followed. Furthermore, public surveys are to reflect randomness. While totally telephonic public ascertainments might well miss the deaf and hearing impaired, a survey employing such random sample techniques would satisfy our ascertainment requirements.

15. More specifically, Gottfried contends that none of the challenged licensees interviewed community leaders who represent the interests of the deaf and hearing impaired and, thus, the needs of that segment of the population have not been ascertained.

16. It is through the process of ascertaining community leaders that a broadcast licensee arrives at the problems, needs, and interests of its community. The Community Leader Checklist formulated by the Commission in the *Renewal Primer* and *Noncommercial Primer* and filed at renewal by each nonexempt licensee contains 19 specifically identified community elements or institutions as well as one "other" category. It is by continually ascertaining leaders of the elements so set forth in the checklist that a licensee meets the requirement that its ascertainment efforts constitute a representative crosssection of those who speak for the interests of the area served by the station. Neither the deaf and hearing impaired nor the physically handicapped in general constitute a separate checklist category. The licensee has the option, however, to include under the "other" category leaders in elements not found on the checklist that it determines to be significant. We should emphasize that recently the Commission addressed the petitioner's concern—one shared by other groups—that despite their significance in the com-

munity they are excluded from ascertainment because they are not set out as one of the 19 elements. Thus, in adopting the notice of proposed rule making in *Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey*, Docket No. 78-237, FCC 78-583, released August 8, 1978, we are proposing that licensees be obligated to seek out "other" accessible groups in the community that do not appear on the checklist. Therefore, in this instance, failure to include representatives from the aurally handicapped segment of society would not, in and of itself, discredit an ascertainment. Importantly, however, the licensees herein ascertained leaders from the health, welfare, and elderly elements of the community. Further, most of the licensees in their oppositions noted that these elements included leaders who are involved with the whole range of concerns of the physically handicapped which includes the deaf and hearing impaired. Moreover, several of the licensees ascertained representatives from GLAD and other groups identified by Gottfried as constituting persons aware of the problems of the aurally handicapped.[7]

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[7] The community leader ascertained by the licensees included: Marcella M. Meyer, Executive Director, GLAD, interviewed by KABC-TV and KCET-TV; L. Ronald Jacobs, Head of Student Personnel, Campus Services for the Deaf, California State University, Northridge, California, interviewed by KABC-TV; Lenny Meyer, Present of GLAD, and James K. Riley, Chairman, Youth Forces of GLAD, contacted by KCET-TV; Dr. Edgar L. Lowell, John Tracy Clinic, interviewed by KTTV; Dennis Landesman, President, Children Hear More Institute ascertained by KTLA-TV. In addition, KABC-TV interviewed Father George Doran, Los Angeles Director, Deaf CCD Projects, KNBC-TV contacted Sarah

Programming

17. Gottfried alleges that during the past license term each of the licensees failed to offer programming directed at the special needs of the hearing impaired. Furthermore, she urges that the station's public inspection files do not reflect any annual listing of problems-programs relating to the hearing impaired.

18. Regarding the annual problems-programs listings, Sections 1.526 and 1.527 of the Commission's Rules and Regulations require commercial and noncommercial television licensees to place annually in their public inspection file a list of not more than ten significant problems that were served by the station during the preceding 12 months and the programs offered in response to those problems. There is no requirement that a station program in response to every ascertained need or that it itemize every ascertained need. Thus, the absence of any particular need does not, without more, serve to question a licensee's programming efforts.

19. In order to warrant a hearing on a licensee's past programming, a challenger must plead specific facts which give rise to a substantial and material question as to whether a licensee abused its discretion in its selection of programming matter to serve the needs and problems of its community of license. Here, petitioner would have us reach that conclusion against all the licensees based solely on her contention that the stations did not offer specific programs directed at the hearing impaired.

20. Our review of the licensees' renewal applications and oppositions reveals numerous programs

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McDonald, Director of Inglewood Hearing and Speech Center, and KHJ-TV ascertained Ms. Dottie Soltis, Directors of Interpreters, La Trade Tech College.

aired during the past license period *about* the deaf and hearing impaired. Few, however, were *for* the hearing impaired.[8] Apparently, it is this point that the challenger is really raising. Over the past decade, broadcasters, in response to an ascertained awareness of special needs of their community's minority and ethnic populations, have been offering programs not only *about* but also specifically *for* such groups. Generally speaking, such programming can be achieved without any additional production techniques other than those utilized for regular programming. Obviously, that is not the situation confronting a licensee who might wish to program for the aurally handicapped. For such programming to be effective, it must offer some specific form of visual communication: sign language interpretations, captioning, or extensive utilization of charts, signs, and facial closeups to permit lip reading. Even sign language and lip reading efforts, according to Gottfried, serve to limit the number of deaf and hearing impaired since many do not effectively understand these methods. As noted earlier, there is no Commission requirement for such specialized programming techniques and, accordingly,

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[8] For instance, KTLA-TV relates that it attempts, whenever possible, to supplement its programming with visual materials: News—maps used to locate stories, text of testimony in court cases is visually depicted, color slides used to characterize story, and closeups of newscasters permit lip reading; Weather—visual depiction of forecast and conditions as well as utilization of visual weather symbols; and Sports—visual display of scores, standings, and time remaining. Another station, KTTV, offered a sign language portion of its daily prime-time news program for four-and-one-half years. Presently, the station visually captions a special summary of the news. In addition to the *Captioned ABC News*, KCET has offered PBS programs that have provided visual assistance for the aurally handicapped.

there is no basis to fault a licensee for failure to provide these options for the deaf and hearing impaired in the station's service area. Therefore, we fail to find that a substantial and material question has been raised.[9]

Section 504 of the Rehabilitation Act

21. The aurally handicapped population of Los Angeles is excluded from participation in and denied the benefits of television and, thus, according to Gottfried, the licensees herein have been and continue to violate Section 504 of the Rehabilitation Act of 1973. In this regard, the challenger contends generally that seven of the licensees receive an unidentified amount of federal financial assistance while at the same time discriminating against the deaf and hearing impaired which is prohibited by Section 504. Further, she avers specifically that non-commercial KCET-TV receives 30% of its funding from federal grants yet does not provide the required service to the deaf and hearing impaired.

22. The section in question, "Nondiscrimination Under Federal Grant," Title 29, United States Code, Section 794, states that no handicapped person shall be excluded from participation in, be denied the

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[9] In addition to the programming allegations previously discussed, petitioner contends that KCET-TV refused until May 23, 1977, to begin airing the *Captioned ABC News* despite its availability from PBS and that when it did begin to air the program, it was scheduled at the inappropriate time of 11:30 P.M. Programming decisions as to what to air and when to air it are discretionary matters normally left to the licensee. It is only where an abuse of such discretion has been shown that the Commission questions a licensee's programming or scheduling. We have not been presented any supportive evidence to indicate such an abuse by KCET-TV.

benefits of, or be subjected to, discrimination under any program or activity which receives federal financial assistance. We find merit to the argument raised in the oppositions concerning the applicability of this law to commercial broadcast licensees and, therefore, fail to see how this section applies to the seven commercial licensees now before us. While non-commercial KCET-TV—which apparently receives federal grants—might fall within the purview of the Rehabilitation Act and a violation thereof would be a matter to be considered by the Commission, petitioner has not indicated that the Department of Health, Education, and Welfare—the proper governmental agency to consider such matters—either has made such a determination or has even been asked to make such a determination. Thus, there is no reason to consider this allegation further against any of the licensees. However, in the event some adverse finding were to be made relative to Section 504, the Commission would take whatever action would be appropriate.

Conclusion

23. It is clear from the above discussion that there is no legal basis to the challenges against the eight television stations. However, the Commission is extremely sensitive to the concern that Ms. Gottfried personally has expressed and that she undoubtedly shares with the objectors and the country's hearing impaired. For them, television is not a viable means of communications. At present, neither the Communications Act nor our rules and regulations provide a solution for this segment of society. Hopefully, resolution of some of the unanswered questions prevalent in Docket 20693 and technological advances will both serve to ameliorate the situation.

24. Programs such as the captioned news on PBS aid the aurally handicapped citizen in being linked with the nation; however, few licensees provide a similar link with the local community. Therefore, we urge all television licensees to review the options presently available that, within reason, might provide some of the benefits of the medium of television for this nation's hearing impaired.

25. We must conclude, however, that Ms. Gottfried and the informal objectors have failed to allege specific facts which raise any substantial or material question as to whether a grant of the renewal applications before us would serve the public interest, convenience, and necessity. While we are able to make the necessary statutory finding of Section 309 of the Communications Act of 1934, as amended, to grant renewals of license to KNBC-TV, KNXT-TV, and KTLA-TV, due to various matters still pending before the Commission, the other five stations can not be renewed at this time.

26. Accordingly, IT IS ORDERED, That the petitions to deny the 1977 license renewal applications of the eight Los Angeles, California, television stations, identified in footnote 1, filed by Sue Gottfried, the Greater Los Angeles Council on Deafness, Inc., and its component organizations and several hundred residents of the stations' service area ARE DISMISSED as to all but Sue Gottfried.

27. IT IS FURTHER ORDERED, That the petitions filed by the area residents are considered as informal objections.

28. IT IS ALSO ORDERED, That the petitions to deny and the informal objections ARE DENIED.

29. It is ALSO ORDERED, That the application for renewal of license for Station KNXT-TV, Los

Angeles, California, IS HEREBY GRANTED for a short-term—until August 1, 1979—pursuant to the Commission's By Direction Letter of July 12, 1978, FCC 78-506, subject to the condition imposed in *CBS Inc.*, 57 FCC 2d 505 (1976).

30. IT IS ALSO ORDERED, That the application for renewal of license for Station KNBC-TV, Los Angeles, California, IS HEREBY GRANTED subject to the conditions imposed in *National Broadcasting Company, Inc.*, 56 FCC 2d 411 (1976).

31. IT IS ALSO ORDERED, That the application for renewal of license for Station KTLA-TV, IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
WILIAM J. TRICARICO, *Secretary.*

APPENDIX E

FCC 79-320

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN RE PETITION FOR RECONSIDERATION OF COMMISSION'S ACTION IN LICENSE RENEWAL APPLICATIONS OF CERTAIN TELEVISION STATIONS LICENSED FOR AND SERVING LOS ANGELES, CALIFORNIA

MEMORANDUM OPINION AND ORDER

(Adopted: May 29, 1979; Released: June 15, 1979)

BY THE COMMISSION: COMMISSIONER JONES NOT PARTICIPATING

1. The Commission has before it a petition requesting reconsideration of its Memorandum Opinion and Order, released September 8, 1978, [69 FCC 2d 451 (1978)], filed by Sue Gottfried, individually and on behalf of the deaf and hearing impaired population within the stations' service areas,[1] and the Greater Los Angeles Council on Deafness, Inc. [hereinafter referred to as GLAD]; oppositions to that

[1] The stations, licensees, and file numbers involved are: KABC-TV, American Broadcasting Companies, Inc., BRCT-61; KCET-TV, Community Television of Southern California, BRET-80; KCOP-TV, KCOP Television, Inc., BRCT-102; KHJ-TV, RKO General, Inc., BRCT-58; KNBC-TV, National Broadcasting Company, Inc., BRCT-81; KNXT-TV, CBS, Inc., BRCT-139; KTLA-TV, Golden West Broadcasters, BRCT-100; and KTTV-TV, Metromedia, Inc., BRCT-64. Station KHJ-TV had not filed a renewal application as it was in hearing status (Dockets 16679 and 18759); however, it did file an opposition to the petition to deny.

petition filed by the respective licensees; and petitioners' responses to those oppositions.[2]

Background

2. Petitioners filed petitions to deny the subject stations' renewal applications alleging that their ascertainment efforts were defective as to the deaf and hearing impaired community, their past programming had not met the needs of that segment of the population, and the licensees had violated Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] by their failure to offer programming understandable to the aurally handicapped.

3. The Commission's September 8, 1978, Order denied those petitions. In so doing we granted standing to petitioner Gottfried but denied it to GLAD and its component organizations. The Order found that the subject licensees had violated no Commission requirement in their ascertainment efforts as we have no requirements that stations specifically ascertain the needs of the deaf or supply demographic data relating to an area's hearing impaired population.[3]

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[2] The Commission also has before it a Supplement to Petition for Reconsideration, filed October 30, 1978, and a Second Supplement to Petition for Reconsideration filed November 20, 1978. While neither of these pleadings are authorized by Section 1.45 of the Commission's rules, we will consider the allegations contained therein.

[3] We did note, however, that licensees have the option of ascertaining the needs of that segment of the community as an "other" checklist category and that these licensees had ascertained leaders in the health, welfare and elderly elements of the community and, in many cases, had included leaders involved with the concerns of the physically handicapped, including the deaf and hearing impaired. We have recently proposed to amend the *Primer on Ascertainment of Com-*

With regard to programming, we found that petitioner had failed to raise a substantial and material question as we have no requirement that stations utilize special captioning techniques for the hearing impaired. Finally, we rejected petitioners' contention that the licensees had violated Section 504 of the Rehabilitation Act as it does not appear that this Section applies to commercial broadcast licensees. While Section 504 appears to apply to KCET-TV, petitioner had failed to show that the appropriate agency, the Department of Health, Education and Welfare, had been asked to make, or had made, a determination that KCET-TV had violated the Section.

4. On reconsideration, petitioners assert that because nondiscrimination against the handicapped is a national policy, the Commission must find that a failure by these licensees to observe that policy contravenes the public interest, and requires the denial of their renewal applications. Petitioners additionally resurrect the argument that Section 504 of the Rehabilitation Act of 1973 is applicable and has been violated by the subject licensees. GLAD alleges that KCET-TV receives direct subsidies from the Federal government, and the commercial licensees are within the purview of this statute because they or their "parent organizations," do business with the Federal Government. Petitioners claim that the li-

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munity Problems by Broadcast Renewal Applicants with respect to the "other" checklist category to require licensees to consult with any element or institution which is significant in their communities even if it is not one of the nineteen checklist categories. *In the Matter of Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey*, 69 FCC 2d 1815 (1978).

censees' business contracts with the Federal Government are a matter of record in the Commission's own files. Petitioners argue that the licensees' failure to do anything to meet the needs of some 14 million deaf and hearing impaired citizens, in the face of national policy and Commission concern to the contrary, contradicts any finding that the public interest would be served by the renewal of the subject licenses. Additionally, petitioners contend that the Commission, in its Order, failed to make a factual, or legal, finding that the grant of the aplications of the three stations granted renewal would serve the public interest, convenience and necessity.

5. With regard to GLAD's standing, petitioners claim that the affidavit submitted by Marcella M. Meyers, GLAD's Executive Director, contained sufficient specific allegations to demonstrate that GLAD was a party in interest, and, because a majority of GLAD's component organizations supported the petition, the organization's bylaws provide that all its members bound by that vote.[4]

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[4] When the original petitions to deny were filed by petitioners herein, they lacked affidavits from GLAD or any of its component organizations. Additionally, petitioner Gottfried, who did submit an affidavit, did not state that she was a resident of the community or a listener or viewer of the stations involved. Moreover, the licensees and the Commission received letters from several of the component organizations of GLAD indicating that they did not wish to join in the petition to deny. In response to the licensees' oppositions which took note of the above, Gottfried submitted another affidavit wherein she set out her residence as being within the service area of the challenged stations. Additionally, she submitted an affidavit from Marcella M. Meyer, GLAD's Executive Director, which stated that she was familiar with all of the organizations under the GLAD unbrella and that they were each directly interested in the problems of the deaf and hearing

6. With regard to ascertainment, petitioners assert that the Commission "lumped" the ascertainment efforts of the licensees and thereby gave credit to stations which did not conduct a survey along with those that did. Petitioners likewise dispute our conclusion that the licensees' failure to provide specialized programming for the deaf and hearing impaired did not warrant further inquiry on our part. The basis of petitioners' objection regarding this issue is that the techniques for such programming are currently available and would not, contrary to what we had stated, differ from production techniques utilized for regular programming. Petitioners state that "idiot cards" could be used to supply captions and, since they are already in use, would not require any additional production efforts. Additionally, petitioners contend that special production techniques and equipment are already used for other minorities such as separate make-ups and make-up techniques for black and white actors.

7. Petitioners' supplementary pleadings raise two new issues. In the first supplement, petitioners state that Public Broadcasting System stations aired a program entitled "From Paris With Love: An Evening of French Television," in July 1978. That program included subtitles in English and petitioners state that PBS found as a result of this broadcast that viewers were not adverse to watching captioned programming. The second supplement alleged

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impaired. That affidavit, however, neither supported Gottfried's contention that the component organizations of GLAD backed the petition nor established GLAD itself as a party in interest. Accordingly, the Commission did not treat GLAD or its component organizations as petitioners but limited that status to Sue Gottfried, individually.

that the Commission has violated its obligations pursuant to Executive Order 11914 and Part 85 regulations adopted by HEW to implement Section 504 of the Rehabilitation Act. Petitioners state that it was incumbent upon the Commission to issue regulations to enforce Section 504 of the Rehabilitation Act no later than June 15, 1978, and, having failed to do so, it should now grant reconsideration and order hearings on the subject applications.[5]

Discussion

8. As an initial matter, we note that nearly all of the issues asserted by petitioners in support of their request for reconsideration were raised in petitioners' challenges to the renewal of the subject licenses.[6] It is well established that:

> ". . . reconsideration will not be granted merely for the purpose of again debating matters on which we have already deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685 (1964), aff'd *sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 842 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1965).

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[5] We have also reviewed the oppositions filed by the licensees and the petitioners' response thereto. However, these pleadings are not separately discussed herein. Suffice it to say that the licensees contend that petitioners are merely reasserting contentions already rejected by the Commission and petitioners respond by denying the same.

[6] We also note that some of these allegations have been raised against the Commission and others by the instant petitioners in a case in the United States District Court for the Central District of California. *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California d/b/a KCET*, case No. CV-78 4715 R.

However, while it is not necessary that we discuss in detail allegations which we have previously ruled upon, we will, under our public interest mandate, in this instance, consider and discuss petitioners' arguments including those which had previously been raised in their petitions to deny.

9. *Section 504 of the Rehabilitation Act of 1973, as amended.* As we noted in our Order, released September 8, 1978, it was, and remains, our belief that Section 504 of the Rehabilitation Act does not apply to commercial broadcast licensees. That statute clearly applies to, "program(s) or activit(ies) receiving Federal financial assistance or . . . program(s) or activit(ies) conducted by any Executive agency or the United States Postal Service." Because the Commission is neither an Executive agency nor the United States Postal Service, the Act can only apply to its licensees if they are receiving "Federal financial assistance."

10. The Department of Health, Education, and Welfare has defined that term in its regulations. According to 45 C.F.R. § 85(e), the term "Federal financial assistance," includes:

> ". . . any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:
>
> (1) Funds;
>
> (2) Services of Federal Personnel; or
>
> (3) Real and personal property or any interest in or use of such property, including

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government."

Other than procurement contracts, which are specifically excluded from the definition of "Federal financial assistance," the Commission does not provide any financial assistance to its licensees within the terms of the above-quoted definition. Moreover, except for the broad allegation that the licensees' parent organizations have contracts with the Federal government, petitioners have failed to demonstrate that the commercial licensees receive financial assistance from any other agency or department of the Federal government. Rather, petitioners characterize the respondents' Commission licenses as "contracts" which enable respondents to conduct a business and obtain financial profit and analogize this to receiving financial assistance from the government. Clearly, a Commission license is not a contract. Rather, it is a temporary, revocable, privilege conveying no property right, providing no service and transferring no financial interest. See generally, Sections 301 and 304 of the Communications Act of 1934, as amended, 47 U.S.C. 301, 304; *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); and *Ashbacker Radio Corporation* v. *FCC*, 326 U.S. 327, 331-332 (1945). Therefore, petitioners have not shown that the commercial licensees are within the purview of the Rehabilitation Act.

11. Petitioners assert that KCET-TV, a non-commercial educational television station, is directly subsidized by the Federal government and thus comes within the scope of the Act. As we noted, previously, we would consider the bearing of a violation of the Act upon that licensee's qualifications should such a finding be made by the appropriate Federal agency. In our view, that agency is HEW. While at the time the subject Order was released we were not aware that HEW had been asked to make such a determination, we are now informed by petitioners that on March 13, 1978, a complaint against KCET-TV was filed with the HEW regional office. However, petitioners also state that they have been advised by HEW that it is holding the complaint in abeyance pending the enactment of legislation by Congress to determine which agency has the responsibility to enforce compliance with the Rehabilitation Act. Thus, we again conclude that, with regard to KCET-TV, petitioners' allegation is premature. Should a determination later be made by the appropriate agency that KCET-TV did violate the Rehabilitation Act by failing to provide captioning, we would consider the effect of that determination upon the licensee's qualifications. Accordingly, petitioner has not supplied us with any material information which we have not already considered with regard to Section 504 of the Rehabilitation Act of 1973, as amended, and we will deny reconsideration as to that issue.

12. Finally, petitioners' claim that the Commission was required to adopt regulations to implement Section 504 of the Rehabilitation Act, and Executive Order 11914, is not supported by the evidence. Section 85.4(a) of HEW's rules implementing the Act and the subject Executive Order requires each agency to issue:

> ". . . a regulation to implement section 504 with respect to the programs and activities to which it provides assistance."

The term "agency", as it is used in these rules, is defined in Section 85.3(c) of HEW's rules. This definition is limited to:

> ". . . a Federal department or agency that is empowered to extend financial assistance."

As the Commission is not empowered to extend federal financial assistance, it is not an agency within the meaning of these rules and is not required by Section 85.4(a) of those rules to adopt regulations to implement Section 504. Thus, petitioners' claim that the Commission is required to promulgate rules implementing Section 504 is based upon a faulty premise and is without merit.

13. *Public Interest, Convenience and Necessity Determination.* Where appropriate, our grants of the subject renewal applications were properly based on statutory standards. In paragraph 25 of the subject Order, we stated:

> While we are able to make the necessary statutory finding of Section 309 of the Communications Act of 1934, as amended, to grant renewals of license to KNBC-TV, KNXT-TV, and KTLA-TV, due to various matters still pending before the Commission, the other five stations can not be renewed at this time.

Thus, as to three specifically mentioned stations, we found that we were able to make the "necessary statutory finding of Section 309 of the Communications Act of 1934, as amended," and granted renewal of the licenses. The only reasonable interpreta-

tion of that language includes finding that the public interest, convenience and necessity would be served by the grant. To whatever extent petitioners may not have understood our statutory finding, we reaffirm it herein.

14. Petitioners contend that by reason of our failure to require captioning or other techniques to enable the deaf and hearing impaired to have full access to television broadcasts, we have failed to act in the public interest and the fact that the licensees failed to provide such service rendered their performance a violation of the public interest. However, the subject Order contained an extended discussion of our actions regarding television licensees and the nation's hearing impaired. At the conclusion of that portion of the Order, we noted that:

> Thus, there is no requirement that any television licensee—commercial or non-commercial—provide open or closed captioning or any other form of special visual program material other than for broadcasting emergency information.

We find no error and nothing inconsistent in concluding that licensees are serving the public interest although they are not currently providing captioning, in view of the fact that we have not required licensees to undertake such an activity. Furthermore, to judge a licensee's qualifications on the basis of the retroactive application of such a requirement would, in our opinion, raise serious questions of fundamental fairness. Thus, there is no inconsistency or error in our finding that the subject licensees had met their public interest burden even though they did not caption their programming.

15. *Ascertainment.* Petitioners charge that we "lumped" the ascertainment surveys of all of the subject licensees in determining that their ascertain-

ment efforts were sufficient. This is not so. Rather, with regard to ascertainment, we stated that: 1) the Commission has no requirement that an applicant submit demographic data relating to an area's hearing impaired population with the ascertainment information included in a renewal application; and, 2) that even though there is no requirement for licensees to ascertain community leaders of the deaf, hearing impaired, and handicapped community as separate "checklist categories", many of the licensees herein did ascertain persons involved with "the whole range of concerns of the physically handicapped which includes the deaf and hearing impaired," as part of their ascertainment of leaders from the health, welfare, and elderly elements of the community.[7] Thus, we determined that the failure to include representatives of the aurally handicapped segment of society did not discredit the licensees' ascertainment efforts, We stand by this conclusion. As stated above, there is no current requirement that such persons be contacted, and it would violate our notions of fundamental fairness to retroactively impose such a new requirement upon licensees. We did not "lump" the efforts of the respondents. What we did conclude, parenthetically, was that even though there was no requirement, *most* of the licensees did ascertain leaders involved in the concerns of the physically handicapped, including the deaf and hearing impaired. Additionally, we noted that several of the licensees ascertained representatives from GLAD and other groups identified by petitioner as constituting persons aware of the problems of the aurally handi-

[7] We also noted that licensees have the option of ascertaining leaders from, by way of example, the deaf and hearing impaired community under the "other" checklist category.

capped. Thus, we find no error warranting reconsideration.

16. *Programming.* Petitioners fault the Commission for not having taken action against the respondents for their failure to provide captioning or other supplementary visual material for use by the aurally handicapped. Again, petitioners object to the Commission's refusal to take action against licensees for their failure to do something that we have not required them to do.[8] Again, it would violate our notions of fairness to retroactively apply such a new requirement.

17. *Standing of GLAD.* Petitioners' allegation of error in our denial of standing to GLAD and its member organizations is without merit. As discussed in the Order released September 8, 1978, GLAD was inconclusive about its desire to participate in the proceeding and several of its member organizations notified licensees and the Commission that they did not wish to join in the petition. Whether these organizations were able to effectuate their withdrawal from the proceeding under GLAD's by-laws is an internal matter of GLAD in which we would not presume to interfere. However, it would likewise be inappropriate for us to consider these organizations as parties to a petition which they expressly repudiated. In any case, because of the uncertainty of GLAD's intentions in this matter, it was entirely

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[8] This conclusion is not affected by the petitioners' allegation that PBS's subtitled "From Paris With Love" program demonstrated that open captioning would be acceptable to the public. Even assuming, *arguendo*, that such is the case, we clearly have no requirement for such captioning and, as stated above, will not fault the licensees for their failure to provide it during the past license term.

correct to conclude that it lacked standing. However, assuming *arguendo* that GLAD had conclusively demonstrated its standing as a party in interest, it does not follow that it has been aggrieved by the Commission's denial of standing to it as the petition which it sought to be a party to was fully considered on the merits. Thus, with regard to the issue of GLAD's standing, there has been no error warranting reconsideration.

Recent Developments

18. In our previous Order, we provided a background discussion of the Commission's actions regarding television licensees and the nation's hearing impaired. Since that time, further action has been taken which bears mention. Following the Commission's grant of authority in 1972 to the Public Broadcasting System (PBS) to initiate experiments in closed captioning utilizing the vertical blanking space of line 21 of the television broadcast signal and the Commission's adoption of rules in 1976 to permit closed captioning on Line 21 for visual display of aural material accompanying a television program,[9] PBS and the National Bureau of Standards (NBS), with funding provided by the Department of Health, Education and Welfare (HEW), have worked together on the development of the closed captioning technology. As a result of the experiments conducted by PBS and NBS, HEW recently announced the institution of a closed captioning project for the

[9] *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, Docket No. 20693, 63 FCC 2d 378 (1976).

hearing impaired.[10] Participants in the project are PBS, ABC and NBC, which have agreed to provide a total of up to 20 hours of captioned programming a week by early 1980. The special decoding devices needed by the hearing impaired to enable them to see the captions will be provided by Sears, Roebuck & Co. with no mark-up for profit. HEW will help establish and fund a nonprofit National Captioning Institute that will caption programs for the television networks.

19. On April 5, 1979, the Commission received an extensive and comprehensive briefing on the progress of the closed captioning project by representatives of ABC, NBC, PBS and HEW. As a result of the meeting, we are satisfied that important advances are being made toward achieving the goals which petitioners espouse and which we share—namely, the access of the aurally handicapped to the medium of television. We expect that the closed captioning project will be a success.[11] However, if at a later date it is demonstrated that the project is not successful in making television programming more available and enjoyable to the hearing impaired, then it may be necessary for the Commission to determine if a rulemaking is warranted to ensure that the hearing impaired are not deprived of the benefits of television.

Conclusion

20. We find that the petitioners have raised no issue, have provided no new facts and have demon-

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[10] *Broadcasting Magazine*, March 26, 1979, at 32-33.

[11] Transcript of Commission Meeting on Closed Captioning for the Deaf, April 5, 1979, at 3.

strated no error in our previous decision which warrants the reconsideration of our Memorandum Opinion and Order released September 8, 1978, in this proceeding.

21. At the time the September 8, 1978, Memorandum Opinion and Order was released, renewal could not be granted to five of the challenged stations because of other matters then outstanding with regard to their applications. As these matters remain outstanding, no further action is being taken herein relative to their renewal applications.

22. Accordingly, IT IS ORDERED, That the Petition for Reconsideration, filed October 2, 1978, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

APPENDIX F

RELEVANT STATUTES AND REGULATIONS

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, provides:

> § 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

2. Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794a, provides in pertinent part:

> § 794a. Remedies and attorney fees
>
> (a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of

1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

3. Section 307 of the Communications Act of 1934, 47 U.S.C. 307, as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Section 1241(a), 95 Stat. 357.

§ 307. Licenses

(a) Grant

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * * * *

(d) Terms

* * * Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed five years in the case of television broadcasting licenses, for a term of seven years in the case of radio broadcasting licenses and for a term of not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. * * *

4. Section 309 of the Communications Act of 1934, 47 U.S.C. 309, provides in pertinent part:

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each

application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies * * *. * * * The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and

issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to

participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * * * *

5. 28 C.F.R. Part 41 (45 C.F.R. Part 85 as amended and redesignated by 46 Fed. Reg. 40686-40687 (1981)) provides in pertinent part:

§ 41.1 Purpose.

The purpose of this part is to implement Executive Order 12250, which requires the Department of Justice to coordinate the implementation of section 504 of the Rehabilitation Act of 1973.

§ 41.2 Application.

This part applies to each Federal department and agency that is empowered to extend Federal financial assistance.

* * * * *

§ 41.4 Issuance of agency regulations.

(a) Each agency shall issue, after notice and opportunity for comment, a regulation to implement section 504 with respect to the programs and activities to which it provides assistance. The regulation shall be consistent with this part.

* * * * *

(c) Each such agency regulation shall: (1) Define appropriate terms, consistent with the definitions set forth in § 41.3 and with the standards for determining who are handicapped persons set forth in Subpart B of this Part; and

(2) prohibit discriminatory practices against qualified handicapped persons in employment and in the provision of aid, benefits, or services, consistent with the guidelines set forth in Subpart C of this Part. The regulation shall include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency.

§ 41.5 Enforcement.

(a) Each agency shall establish a system for the enforcement of section 504 and its implementing regulation with respect to the programs and activities to which it provides assistance. The system shall include: (1) The enforcement and hearing procedures that the agency has adopted for the enforcement of title VI of the Civil Rights Act of 1964, and (2) a requirement that recipients sign assurances of compliance with section 504.

(b) Each agency regulation shall also include requirements that recipients: (1) Notify employees and beneficiaries of their rights under section 504, (2) conduct a self-evaluation of their compliance with section 504, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, and (3) otherwise consult with interested persons, including handicapped persons or organizations representing handicapped persons, in achieving compliance with section 504.

§ 41.6 Interagency cooperation.

(a) Where each of a substantial number of recipients is receiving assistance for similar or

related purposes from two or more agencies or where two or more agencies cooperate in administering assistance for a given class of recipients, the agencies shall: (1) Coordinate compliance with section 504, and (2) designate one of the agencies as the primary agency for section 504 compliance purposes.

(b) Any agency conducting a compliance review or investigating a complaint of an alleged section 504 violation shall notify any other affected agency upon discovery of its jurisdiction and shall inform it of the findings made. Reviews or investigations may be made on a joint basis.

6. 34 C.F.R. 104.61 provides:

§ 104.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 100.6-100.10 and Part 101 of this title.

7. 34 C.F.R. Part 100 provides in pertinent part:

§ 100.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such in-

formation, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part.
* * *

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. * * *

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

§ 100.7 Conduct of Investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this

part may by himself or by a representative file with the responsible Department official or his designee a written complaint. * * *

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 100.8.

(2) If an investigation does not warrant action pursuant to paragraph (1) of this paragraph (d) the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

* * * * *

§ 100.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened

noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

* * * * *

§ 100.10 Decisions and notices.

* * * * *

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible De-

partment official that it will fully comply with this regulation.

* * * * *

9. 46 Fed. Reg. 37068-37069 (1981) provides in pertinent part:

Office of the Secretary

Non-Discrimination on the Basis of the Handicapped in Programs or Activities Receiving Federal Assistance

The Department of Commerce (DOC) gives notice that, until such time as it has adopted and published its own specific implementing regulations, it will operate in accordance with the regulations developed by the Department of Health, Education, and Welfare, the agency responsible for promulgating general regulations to implement the provisions of the Rehabilitation Act of 1973, as amended (29 U.S.C 794).

* * * * *

Effective June 3, 1977, the Department of Health, Education and Welfare issued final regulations implementing Section 504 as it applies to recipients of federal financial assistance from that agency. (45 CFR Part 84). Recipients of federal financial assistance from the Department of Commerce may look to the HEW regulation for guidance as to their obligation under Section 504 of the Rehabilitation Act.

Malcolm Baldridge,

Secretary of Commerce.

10. 45 C.F.R. 84.61 provides:

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6-80.10 [1] and Part 81 of this Title.

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[1] The pertinent provisions of 45 C.F.R. 80.6-80.10 are identical to the corresponding provisions of 34 C.F.R. 100.6-100.10 reprinted above.

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Petitioner's Reply Brief

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No. 81-799

In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

SUE GOTTFRIED, GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL.

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 4

FCC v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981) 2, 4

McLean Trucking Co. v. *United States*, 321 U.S. 67 3

NAACP v. *FPC*, 425 U.S. 662 3

Statutes and rule:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 3

Rehabilitation Act of 1973, Section 504, 29 U.S.C. (& Supp. III) 794 ..... 1, 2, 3, 4, 5

20 U.S.C. 1681(a) 4

42 U.S.C. 6102 4

47 U.S.C. 402(b) 4

Sup. Ct. R. 17.1(c) 4

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REPLY MEMORANDUM FOR THE PETITIONER

The question presented in this case is whether the Federal Communications Commission, in a broadcast licensing proceeding concerning a public television station, must make an independent assessment of the station's compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, even though enforcement of that provision is committed to other federal agencies. Respondents' Brief in Opposition fails in large measure to come to grips with this important question and completely misses the thrust of the Commission's analysis.

1. Respondents maintain (Br. in Op. 3-4, 9) that review by this Court would be premature, since adjudication of KCET's license renewal application has not been completed and a "negative sanction" against KCET has not yet been imposed. The implication of respondents' argument is that this case will not be ripe for review at least until the Commission has conducted proceedings to determine both what Section 504 requires of a public television station such as KCET and whether KCET met those standards during the license term under review. But the question raised in the

Commission's petition is whether such proceedings are required at all. Thus, respondents' argument begs the question. Indeed, if review is deferred until after final adjudication of KCET's license renewal application and the completion of an appeal to the court of appeals, it will then be too late to avoid many of the adverse consequences of the decision below. The Commission will have been compelled to determine what Section 504 requires in the field of broadcasting without awaiting the articulation of interpretive standards by the funding agencies charged with the implementation of that provision. Moreover, in the meantime, most, if not all, of the nation's 270 noncommercial educational television stations will have filed applications for license renewal, and in those cases in which renewal is opposed on grounds of noncompliance with Section 504, protracted and costly hearings may be required. In these circumstances, deferral of review would amount to a denial of effective review for both the Commission and the nation's noncommercial television stations.[1]

2. Noting that the Commission considers antitrust factors and the employment practices of its licensees, respondents argue (Br. in Op. 7-8) that the Commission should be compelled to make an independent assessment of a public television station's compliance with Section 504. Respondents' argument, however, is plainly flawed. First, as noted in our petition (Pet. 15) and as respondents concede (Br. in

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[1]This Court has not required final adjudication of a station's application to the Commission before reviewing a decision of the court of appeals dictating the factors to be considered by the Commission under the public interest standard. For example, in *FCC* v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981), the Court did not wait to see if the holding of the court of appeals resulted in the denial of a license application, or some other "negative sanction" (Br. in Op. 4), before reviewing the validity of the court of appeals' directive to the Commission to consider entertainment format changes when ruling upon radio renewal or transfer applications.

Op. 7), the Communications Act itself directs the Commission's attention to antitrust matters. By contrast, the Communications Act makes no reference to the policy expressed in Section 504. Second, respondents ignore the critical distinction noted in our petition (Pet. 14) between the Commission's voluntary decision to assume certain responsibilities under statutes such as Title VII of the Civil Rights Act of 1964 and the imposition of such duties by a court. *NAACP* v. *FPC*, 425 U.S. 662 (1976), upon which respondents rely (Br. in Op. 7), does not suggest that the Commission was *obligated* to take on such duties but only that its decision to do so "can be justified" (425 U.S. at 670 n.7). Indeed, the thrust of the decision in that case—holding that the Federal Power Commission was not required to issue regulations prohibiting employment discrimination by its regulatees—is antithetical to respondents' argument. As the Court noted, "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare" (*id.* at 669). And as the Chief Justice observed in his concurring opinion (*id.* at 674; emphasis in original): "To the extent that the *judiciary* orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly."[2]

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[2]Respondents also rely (Br. in Op. 7) upon *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944). In that case, referring in particular to the antitrust laws, the Court stated (*id.* at 80) that the Interstate Commerce Commission must consider other laws and policies to "the extent * * * Congress indicates a desire to have those policies leavened or implemented" in the administration of the specific legislation committed to the ICC. In the case of Section 504, Congress had not indicated a desire to have the FCC undertake enforcement responsibilities. On the contrary, Congress has committed the enforcement of that provision to the funding agencies. The Commission has stated that it will consider

In our petition, we contended (Pet. 13-14) that the logic of the decision below might require the Commission to incorporate into the public interest standard, not only Section 504, but many other laws embodying important national policies, and we cited the specific examples of 42 U.S.C. 6102 and 20 U.S.C. 1681(a), which prohibit discrimination on the basis of age and sex and employ language virtually identical to that in Section 504. As if to illustrate our point, respondents agree (Br. in Op. 8) that 42 U.S.C. 6102 and 20 U.S.C. 1681(a) should be included within that standard. But the reasoning of the decision below is not limited to statutes cast in the same mold as Section 504. By its logic, the public interest standard could be held to incorporate many other statutes embodying important national policies, thereby impairing that standard's utility as " 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.' " *FCC* v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981), slip op. 11, quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

3. Respondents suggest (Br. in Op. 9) that the absence of a conflict among the circuits warrants denial of the Commission's petition. But since the court below has exclusive jurisdiction over broadcast licensing cases (47 U.S.C. 402(b)), no such conflict will ever arise. A conflict among the circuits is certainly not a prerequisite for review of an important question of federal law in these circumstances. See Rule 17.1(c) of the Rules of this Court.

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any violations of Section 504 found by those agencies. Respondents point to no evidence even suggesting that Congress intended the Commission to go further and incorporate Section 504 into the public interest standard.

4. Finally, respondents suggest (Br. in Op. 3) that the Commission has been derelict in making television accessible to the hearing impaired. In fact, however, the Commission turned its attention to this technically and financially complex problem even before Section 504 was enacted (Pet. App. 51a). It has encouraged experiments by broadcasters, some of which now appear highly promising, and has continually monitored technical advances to determine what can feasibly be required (*id.* at 51a-53a). However, the Commission has concluded that at present there are "too many unanswered questions," both "technical and financial," to impose mandatory standards (*id.* at 53a). Thus, the issue is not whether the Commission will consider methods of making television accessible to the hearing impaired under its own public interest standard, but whether it will be compelled to make an independent assessment of public stations' compliance with Section 504 even though the enforcement of that provision has been committed to other agencies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1981

DOJ-1981-12

Docket Sheet

NO. 81-799-CFX (Vide: 81-651 81-298)	TITLE	Federal Communications Commission, Petitioner v. Sue Gottfried, et al.

DOCKETED	COURT
Oct. 27, 1981	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondents: Abraham Gottfried, Arthur B. Goodkind, Edgar F. Czarra, Jr., Timothy B. Dyk Thomas J. Dougherty, Stanley Fleishman
Sept. 25, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until October 27, 1981 by Burger, CJ, Sept. 29, 1981.
Oct. 27, 1981	Petition for writ of certiorari filed. (Record filed).
Nov. 25, 1981	Motion of Corporation for Public Broadcasting, et al. for leave to file a brief as amici curiae filed. (Also in 81-298).
Nov. 30, 1981	Brief for the respondents in opposition filed. (Vide: 81-298)
Dec. 9, 1981	Reply memorandum for the petitioner filed.
Dec. 9, 1981	DISTRIBUTED. 1-8.
Jan. 11, 1982	The motion of Corporation For Public Broadcasting, et al. for leave to file a brief as amici curiae is GRANTED. In No. 81-298 the petition for writ of certiorari is GRANTED limited to question 2 presented by the petition. In No. 81-799 the petition for writ of certiorari is GRANTED.

Feb. 3, 1982	Motion of the Solicitor General to consolidate Nos. 81-298 and 81-799 for briefing and oral argument filed.
Feb. 8, 1982	DISTRIBUTED. 2-19. (Above motion).
Feb. 16, 1982	Response by respondents to above motion of the Solicitor General filed.
Feb. 22, 1982	The motion of the Solicitor General to consolidate this case with 81-298 for briefing and oral argument is GRANTED.
Feb. 23, 1982	Order extending time to file the Government's appendix and brief on the merits until March 11, 1982.
March 10, 1982	Order further extending time to file the petitioner's brief on the merits until March 25, 1982.
March 15, 1982	Motion of respondents to order FCC to advance costs filed. (Also in 81-298).
March 19, 1982	Opposition filed by the Solicitor General to motion of respondents to order FCC to advance costs filed.
March 25, 1982	Brief for petitioner Community Television of Southern California filed. (Vide: 81-298).

(Over)

81-799

Title

No.

DATE	PROCEEDINGS AND ORDERS
March 25, 1982	Brief for respondent CBS Inc. in support of petitioners filed. (Vide: 81-298).
March 25, 1982	Brief for Federal Communications Commission filed. (Vide: 81-298) (Petitioner in 81-799).
Mar. 30, 1982	DISTRIBUTED. 4-2. (Motion of respondents to order FCC to advance costs).
Apr. 5, 1982	The motion of respondents to apportion advancement of funds for the printing of the joint appendix is DENIED.
Apr. 8, 1982	Motion of petitioners for divided argument and for additional time for oral argument filed. (Also in 81-298).
Apr. 16, 1982	Order extending time to file the respondents' brief on the merits until May 15, 1982.
Apr. 19, 1982	The motion of petitioner for divided argument and for additional time for oral argument is GRANTED. Ten additional minutes are allotted for that purpose.
Apr. 22, 1982	Motion of respondents for divided argument and for additional time for oral argument filed. (Also in 81-298)
Apr. 28, 1982	Order extending time to file the respondents' brief on the merits until June 4, 1982. (FURTHER EXTENSION).
May 3, 1982	The motion of respondents for additional time for oral argument is GRANTED and ten additional minutes are allotted for that purpose. The request of respondents for divided argument is DENIED.
May 26, 1982	Brief, amici curiae, of The Deaf Counseling, Advocacy and Referral Agency, Inc., et al., filed. (Vide: 81-298).
June 7, 1982	Brief for respondents Sue Gottfried and The Greater Los Angeles Council on Deafness, Inc. filed. (Vide: 81-298).
June 7, 1982	Motion of respondents to reconsider order denying motion for divided argument filed. (Also in 81-298).
June 14, 1982	The motion of respondents to reconsider order denying motion for divided argument is DENIED.
Aug. 5, 1982	CIRCULATED.
Aug. 20, 1982	Reply brief for petitioner Community Television of Southern California filed. (Vide: 81-298)
Sept. 17, 1982	Reply brief for the Federal Communications Commission filed. (D). (Vide: 81-298).
Oct. 12, 1982	ARGUED.